



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 560 OF 2011

KOMBO HASSAN KOMBO

(Suing as the administrator of the

Estate of MWISHAHALI KOMBO MWINYIHAJI).....PLANTIFF

VERSUS

OMAR SAID ABDALLA.....1ST DEFENDANT

MENASIRI MWINYIHAJI NASSIR.....2ND DEFENDANT

RULING

1. The Application for consideration is the Notice of Motion dated 31st July, 2018 in which the Defendants/Applicants are seeking orders of stay of execution of the ruling delivered on 31st August 2017 as well as the resultant decree and all consequential orders pending hearing and determination of appeal. The application is premised on the grounds thereon and supported by the affidavit of Omar Said Abdalla, the 1st defendant sworn on 31st July 2018.

2. In the ruling delivered on 31st July 2017 the court awarded costs of this suit to the plaintiff only, which costs are to be paid by the 2nd defendant. The applicant avers that he was aggrieved by the said ruling and has preferred an appeal thereto. The applicant avers that he has a credible appeal against the impugned decision and that no prejudice shall be suffered by the respondent if this application is allowed.

3. It was submitted by the applicant’s counsel that the application has been lodged without any delay whatsoever and that unless the court grants orders as sought herein, the 1st defendant is likely to suffer substantial loss through satisfaction of a decision on costs against him inter alia, in a matter where he was wrongly enjoined ab initio, the net resultant loss whereof would be too onerous to be remedied in any way, manner of form, considering the amount claimed in the subject Bill of Costs vis-a-vis the 1st defendant’s humble background and misjoinder. The applicant submitted that he was prepared to abide by any conditions the court may reasonably impose on grant of the orders sought herein. The applicant submitted that it is in the interests of justice, fairness, equity, constitutionalism, principles of Rule of Law and Natural Justice and protection of fundamental and freedoms enshrined in the constitution of Kenya, 2010 that this application ought to be allowed as prayed. The applicant’s submission is that no prejudice shall befall any of the parties herein should the instant orders sought be granted.

4. The applicant’s counsel cited the provisions of order 42 Rule 6 of the Civil Procedure Rules, Article 48 and 159 of the Constitution of Kenya- 2010. Counsel also relied on the case of **Butt –v- Rent Restriction Tribunal (1979)eKLR and Reliance Bank Ltd –v- Norlake Investments Ltd (2002) 1EA 227.**

5. In opposing the application the plaintiff/respondent filed a replying affidavit dated 30th January 2019 in which he deposed that the ruling was properly issued on notice to both parties and that even if the applicant was not served, the respondent was not to blame. The respondent contended that the appeal has no chances of success and that the applicant has not established grounds for grant of stay of execution, adding that the respondent is in a position to refund the decretal sum if the applicant succeeds in the appeal.

6. Counsel for the respondent submitted that the ruling notice was addressed to Khatib and Company Advocated and Appollo Muinde and Ngonze Advocates. That M/s Appollo Muinde and Ngonze Advocates were on record for the applicant and therefore the notice was directed to them. Counsel submitted that the respondent was not at fault for non-service of the ruling notice. The respondent’s counsel further submitted that there is no draft memorandum of appeal or proposed grounds of appeal in the affidavit in support of the application and as such the court has no opportunity to examine whether the intended appeal has a likelihood of success. They submitted that the intended appeal has no chance of success. The respondent’s counsel submitted that the order sought to be stayed is an order of costs. That this being a

monetary issue, the applicant shall not suffer loss if the application is not allowed as the respondent has deposed that he is a person of good income and is in a position to refund the money if the appeal is successful. Counsel for the respondent relied on the case of **Focin Motorcycle Company Limited –v- Ann Wambui Wangui & Another (2018) eKLR** and submitted that the applicant has not explained the inability of the respondent to repay the monies should the appeal succeed. It was the respondent's submission that the applicant has not established the grounds of granting stay of execution pending appeal as provided for in Order 42 Rule 6 of the Civil Procedure Rules, adding that the application has been brought after unreasonable delay and after the respondent had initiated execution process. The respondent submitted that the application is devoid of merit and that the same should be dismissed with costs.

7. I have considered the application as well as the rival submissions. The application is for stay pending appeal. Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that must be met before an order for stay of execution is allowed. It states 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 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 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 unreasonably delay.

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. ”

8. It is clear from the working of Order 42 Rule 6 that for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; a) that substantial loss may result to the applicant unless the order is made; (b) the application has been made without undue delay; (c) such security as to costs has been given by the applicant.

9. In the present application, the applicant alleges that he would suffer substantial loss unless stay of execution is granted. The order appealed against was for payment of costs. The respondent has deposed that he is capable of refunding the money if the appeal is successful. The applicant has not challenged the respondent's averment. There being no explanation of the inability of the respondent to repay the monies if the appeal succeeds, it is my view that the applicant has not demonstrated that he would suffer any substantial loss. In this case, I am not convinced that the intended appeal will be rendered nugatory if the order of stay is not granted.

10. The order appealed against was made on 31st August 2017 and this application was filed on 31st July 2018. This is a period of about ten (10) months. On whether or not the application was brought without undue delay, I am of the view that the application has been brought after unreasonable delay. Moreover, there was no proper explanation given for the delay.

11. Having considered the application before me, I am not persuaded that the same has met the pre-requisites of granting of stay of execution under Order 42 Rule 6. In the result, I find that the Notice of Motion dated 31st July 2018 as lacking in merit and hereby dismiss it with costs to the respondent.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 30th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE