



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL 266 OF 2012

THIKA ROAD HEALTH SERVICES.....APPELLANT

V E R S U S

NANCY NJAKAI.....RESPONDENT

RULING

This is an application by the Appellant by Notice of Motion dated 28th May 2012 for the main order that there be stay of execution of decree pending hearing and determination of the appeal herein. It is brought under Article 25(c), 50(1) and 159 of the Constitution; Section 1A, 1B, 3A, 63(e),78 of the Civil Procedure Act (the Act); Order 12 rule 7, Order 22, Order 42, rule 6(1) and (2) of the Civil Procedure Rules, 2010 (the rules). Rule 6(2) of Order 42 sets out the legal conditions for the grant of an order of stay of execution.

Those conditions are that the application must be made without unreasonable delay; that the applicant must stand to suffer substantial loss unless the order for stay sought is granted; and that the applicant must give such security as the court might order for the due performance by him of any order or decree that may ultimately be binding upon him upon disposal of his appeal.

There is a supporting affidavit sworn by one Dr. William Moruri Nyakiba who describes himself as one of the Directors of the Appellant.

The Respondent has opposed the application upon the grounds set out in the replying affidavit sworn by her and filed on 6th June 2012 and grounds of opposition filed on the same date.

Apart from giving a chronology of events of the lower court case that led to default judgement being entered against the Appellant (and why the appeal will not succeed) the Respondent has stated that the Appellant's averments are baseless and misleading. She has urged the court to dismiss the application with costs as it is intended to delay her enjoyment of the fruits of the judgment.

The learned counsels filed written submissions. It is vital to take note that the prospect of success or otherwise of the appeal is not one of the matters that must be considered in this application. This is what the parties have substantially dwelt on in their pleadings and submissions. It suffices that the Appellant had an undoubted right of appeal which it has duly exercised, and that there is a proper appeal before the court. Whether or not the appeal is meritorious is a matter to be decided when it is heard.

After setting out above the matters that the Court is required by the law to consider in such an

application, it is essential to consider them in the circumstances of this case.

As for delay, ruling by the lower court for setting aside of the ex-parte judgment was delivered on 26th April 2012. The present application was filed on 29th May 2012. In the circumstances, the application was filed without undue delay.

May substantial loss result to the Appellant unless the order of stay of execution sought is made? The decree in issue is a money decree and in such instances, substantial loss will not normally occur. But there may be substantial loss where, if the appeal ultimately succeeds, the Appellant is not able to recover the decretal sum paid to the Respondent or undue difficulty in such recovery ensues.

In the present case, it has not been alleged by the Appellant that the Respondent will have any difficulty at all in refunding the decretal sum (which now stands at Kshs. 180,946/= or that the Appellant would encounter considerable difficulty in recovering the same. It is probably in the best interests of the Appellant to pay up the decretal sum now and avoid further accruing interest. It has not pleaded inability to pay.

The Respondent has submitted that if the Court is inclined to exercise its discretion in favour of the Appellant then 'the entire sum in the judgment be deposited in an account in the joint names of the advocates appearing.

The Appellant has not demonstrated that it will have difficulty in recovering the decretal sum from the Respondent in the event that it succeeds in its appeal, and that it therefore stands to suffer substantial loss. On the other hand, the Respondent has not filed an affidavit of means demonstrating that she has the means to pay the decretal sum if the appeal were to succeed, in the circumstances, the decretal amount should be deposited in an interest earning account in the joint names of the advocates for the parties until the determination of the appeal. The court so orders. Stay of execution of decree pending hearing and disposal of the appeal is hereby granted upon the deposit of the entire decretal as stated above. Costs of this application shall be in the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 3rd Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE