



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 175 OF 2015

CATHERINE MUICHUHIO

T/A

FLOWERS BY CATHY.....PLAINTIFF.

VERSUS

1. HARON MOGAKA ONWONG'A

2. MARGARET WANGUI

GACHUI.....DEFENDANTS

RULING

1. By an application by Notice of Motion dated 6.1.2016 the Appellant seeks in the main that she be granted stay of proceedings in RMCC No. 570 of 2015 pending the hearing and determination of the appeal herein. The appeal was provoked by a decision by the trial court, N. NJAGI, SPM dated the 17.11.2015 by which the court dismissed an application seeking to set aside a default Judgment in favour of the Respondent and against the Appellant.

2. From the pleading filed by the parties, the suit before the lower court sought a liquidated claim in the sum of Kshs.860,000 on account of refund on an alleged breach of contract. I therefore take it that is the sum that a default judgment was entered for while the matter pends hearing on prayers from general damages for breach of contract. When the trial court declined to set aside a stage was set for formal proof and it is these proceedings by way of formal proof the Appellant seeks to stay.

3. At the hearing before the court the Respondents, readily conceded that they do not oppose the application provided the Appellant provides security for the due performance of the decree that may be ultimately be found to binding upon it.

4. Against that offer the Appellants advocate chose not to take it on the basis that her client does not have the full sum. Ms. Mboku further submitted that the Civil Procedure Rules do not provide for stay of proceedings but only stay of execution. She however conceded that the court can order deposit of a reasonable sum. She however did not offer any specific sum or shown what yardstick is used to establish a reasonable sum. She relied on **KPLC -VS- ESTHER WANJIRU WOKABI**.

5. In his report Mr.Mogaka pointed out to court that the provisions of order 42 Rule 6 Civil Procedure Rules under which the application ought to have been brought provide for both stay of execution and proceedings. He pointed further out that the liquidated claim for which judgment has been entered was

money paid to the Appellant for delivery of wedding items which the Appellant failed to deliver thereby compelling the Respondents to make alternative arrangements.

6. In her response Ms.Mboku offered no answer to the submissions by Mr.Mogaka save that she stressed the position that if proceedings are allowed to go on before the trial court, her per client will not have the right of audience.

Analysis and determination

7. The only issue for determination before me based on the concession made by the Respondent is what conditions this court ought to impose on granting stay of proceedings. While the Respondent says the court is enjoined to order the deposit of the full sum already adjudged as a judgment by the lower court, the Appellant contends that such a condition would only arise when the court is asked to stay execution.

8. The overriding objectives of the court under sections 1A &1B as well as order 43 Rule 1(a) and order 51 (1) cited to ground the application are to this court general provisions which do not by themselves entitle the grant a stay of proceedings. They are irrelevant to ground on application for stay of proceedings pending appeal. That is not to say that the application deserves no consideration by the court. This court is duty bound to apply the law whether cited to it or not. The law the applicant ought to have cited but which she failed to cite is Order 42 Rule 6. That provision is worded as follows:

Order 42 Rule 6 in whole

6 Stay in case of appeal [Order 42, rule 6.]

(1 (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

9. The court's view is that the principles governing applications for stay of execution or proceedings are the same as set under the provision. I am unable to agree that there is no provision in the Civil Procedure Act and the Rules governing stay of proceedings. To that extent Ms.Mboku contention cannot be right.

10. I am equally of the learning that a party who seeks to invoke the courts jurisdiction to stay proceedings ought to make the application before the trial court in the first instance. That appears not to have been done. Nothing however turns on that failure as the Respondent has conceded to the application and only seeks that the court imposes conditions in compliance with order 42 Rule 6.

11. So far no evidence was availed before court on the costs of the proceedings before the trial court. Equally not disclosed is any decree that would disclose the costs. Consequently the only sum that has been disclosed is the sum claimed in the plaint on which a default judgment was sought and obtained. That sum is disclosed as kshs.860,000/=. As of today that is the sum that is adjudged as due from the Appellant to the Respondent which if the decree was to be executed today, without more, would be binding upon the Appellant. I therefore order that there shall be stay of further proceedings in the lower on terms that the Appellant deposits in a joint interest bearing account in the names of the advocates for the parties the sum of kshs.860,000 within 30 days from today. Should there be default the stay shall lapse and the Respondent shall be at liberty to proceed with the matter as permitted by the law.

12. For the appeal to proceed, and noting that the Record of Appeal has been filed, I direct as follows:

a) The appeal is admitted for hearing before one judge sitting in Mombasa for ½ day.

b) The appeal be canvassed by way of written submissions to be filed by both sides within 30 days from today.

c) A date for highlighting the submissions be fixed at the Registry.

13. The costs of this application are ordered to costs in be the Appeal.

Dated, signed and delivered at Mombasa this 6th day of June 2016.

Ms.Mboku for the Appellant/Applicant.

No appearance for the Respondent.

P.J.O.OTIENO

JUDGE