



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 172 OF 2015

MARIE STOPES KENYA & 2 OTHERS PLAINTIFF

VERSUS

GEORGINA SHERIFF DEFENDANT

RULING

1. The application dated 27th November, 2015 seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That an order of stay of execution of the Judgment and consequential decree in Mombasa CMCC No. 3440 of 2013; Georgina Sherriff versus Marie Stopes Kenya & 2 others be and is hereby granted pending the hearing and determination of the intended appeal against the whole of the ruling made by the Hon. J.M. Nangea (Chief Magistrate) on 16th November, 2015 in respect of the appellants' motion dated 14th July, 2015 together with the consequential orders; and

(iv) The costs of the application be in the appeal.

2. The application is supported by the affidavit of Francis Olalo dated 27th November, 2015 and the grounds on the face of the application. The respondent filed a replying affidavit on 15th December, 2015 opposing the said application.

3. This court scheduled the hearing of the application to 13th September, 2016 by way of highlighting of submissions. There was non-attendance on the part of the applicants' Counsel on the said date. I however note that the applicants' counsel filed their written submissions on 22nd January, 2016. I will therefore consider the said submissions alongside those of the respondent's counsel.

APPLICANTS' SUBMISSIONS

4. The appellants/applicants written submissions indicate that their application has been brought under order 42 rule 6 (2) of the Civil Procedure Rules, 2010 and that there has been no delay in bringing the application since the ruling the subject of the appeal was delivered on 16th November, 2015 and the application was lodged on 30th November, 2015 which is within the thirty day period reserved for filing

of appeals to the High Court. On whether the applicants stand to suffer substantial loss, it was submitted that they stand to suffer reputational risk flowing from the nature of allegations made by the respondent in the suit which remain uncontroverted. This was due to the fact that the principal allegation made in the suit is that the 2nd and 3rd applicants, as the 1st applicant's doctor employees defectively performed a tubal ligation procedure on the respondent thereby causing the procedure to be unsuccessful as a consequence of which she conceived. Given the unfounded nature of the allegations, on professional negligence, the dismissal of the motion to set aside the exparte judgment has in effect driven the applicants from the Judgment seat unheard and has the capacity to do irreparable reputational harm to the two Doctors and the hospital in question who have all consistently maintained in their court filings (pleadings) that the allegations of negligence are totally unsupported by credible scientific evidence.

5. Further, there were no warranties or guarantees made to the respondent on the success of the surgical procedure prior to or post its performance on its success and none could have been given. The submissions also indicate that the applicants standing, goodwill credibility and reputation will be eroded if execution is not stayed as this will leave a negative and indelible impression on the applicants professionalism which may not be erased ever by the success of the intended appeal. The applicants contend that the lower court matter was filed for hearing by the respondent exparte and proceeded to hearing exparte culminating in an exparte Judgment delivered on 24th April, 2015, which was unlawful and unconstitutional as they were condemned unheard. The submissions further indicate that if the stay of execution is not granted and the respondent proceeds with execution; the injury that will be occasioned to the applicants will be incurable even on a successful appeal.

6. The applicants submitted that the award in Mombasa CMCC No. 3440 of 2013 is for a substantial amount of money in the sum of Kshs. 693,000/= and unless stay of execution is granted, the respondent shall proceed with execution by way of attachment and sale of the applicants' assets. In addition, the respondent's financial capability is unknown and the applicants will suffer substantial loss if execution proceeds as they may not recover their money from the respondent. The applicants offered to abide by any condition given by the court including provision of security. They prayed for stay of execution pending appeal. They cited decisions in **Environment and Land case 1 of 2012, Peter Samoei vs Isaac Ruto** [2012] eKLR and **Civil Appeal No. 135 of 2005, Peter Ondande t/a Spreawett Chemis vs Josephine Wangari Karanja** [2006] eKLR, in reference to the conditions that need to be met by an applicant in an application for stay of execution.

RESPONDENT'S SUBMISSIONS.

7. Mr. Maundu, Learned Counsel for the respondent opposed the application dated 27th November, 2015 and relied on their written submissions dated 12th February, 2016 and the replying affidavit filed in court on 15th December, 2015. Counsel submitted that a Judge transferred the case to the lower court *suo motu* and the Deputy Registrar served a notice on the applicants. He relied on multiple decisions in the said submissions that show that in order for an applicant to qualify for stay of execution, he must show that he will suffer substantial loss, the application must be brought without undue delay, and the applicant must provide security. Counsel submitted that no sufficient cause has been shown as there is no decree or certificate of costs issued to warrant the provisions of order 42 rule 6 (2) to be invoked. In his view, the application has been brought prematurely.

8. Mr. Maundu relied on the case of **Illiana Ingasiali Regina & Another vs Likhanya Shikami & Another** [2005] eKLR and **Mombasa Maize Millers Ltd. vs Hassan Sura Dele & Another** [2013] eKLR where applications for stay of execution were dismissed for being premature as no decree or order had been extracted.

9. On the issue of service, it was submitted that an affidavit of service was placed before the Magistrate to show that service was effected through registered post which has been held to be proper service. He referred the court to the case of **Koinange Investments & Development Ltd vs Robert Nelson Ngethe** [2014] eKLR to buttress that point. Mr. Maundu further submitted that the applicants did not show that the respondent will have difficulties in paying the decretal sum or if paid to the Judgment debtor, it will

not be recoverable. He referred to the cases of **Thugge vs Kenya Commercial Bank Ltd. and Kenya Shell Ltd. vs Kibiru & Another**. He stated that information and evidence must be set out to show that the applicants will suffer substantial loss. He wound up his submissions by stating that the applicants had not provided security as required.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicants are entitled to stay of execution pending the hearing of the appeal.

10. The supporting affidavit filed by the applicants shows that the original case file was Mombasa HCC No. 668 of 2009 which was transferred to the Chief Magistrate's court *suo motu* by Judge Kasango. The case was thereafter registered as Mombasa CMCC No. 3440 of 2013. In paragraph 11 of their affidavit, the applicants state that transfer of the case was never communicated to them and they never received a hearing notice. At paragraph 9 of the affidavit they depose that were surprised when they received a letter dated 11th June, 2015 from the respondent's Counsel informing them of the Judgment and demanding immediate payment of Kshs. 693,600/= within 7 days failing which execution would issue against them.

11. At paragraph 13 of the said affidavit, they aver that the respondent never sought leave to serve by way of substituted service and neither did they receive any hearing/mention notices by way of registered post or otherwise. The applicants subsequently filed a Notice of Motion on 16th July, 2015 seeking to have the said Judgment set aside and the hearing of the suit to start denovo. On 16th November, 2015, Hon. J.M. Nangea (CM) dismissed the application with costs on jurisdictional grounds. The applicants filed a memorandum of appeal on 30th November, 2015.

12. The respondent's deponent, Joseph Karanja Kanyi, Advocate, filed a replying affidavit on 15th December, 2015. At paragraph 14 of the said affidavit, he states that the Deputy Registrar on 28th November, 2013 informed the applicants' Advocates of the transfer of the case to the lower court. At paragraph 12 of the affidavit, the respondent contends that at all material times service has been through registered post as per the postal address provided in the Notice of Change of Advocates dated 9th November, 2011. Affidavits of service were served whenever the matter was slated for hearing and/or mention. A bundle of such documents were attached to the said affidavit and marked as JKK 2.

13. A perusal of the annexure marked JKK 3 shows that a notice for the transfer of HCC No. 68 of 2009 to the Chief Magistrate's Court was addressed to the applicants' and respondent's Advocates. As at that time the law firm of Okundi & Company Advocates was on record for the applicants. The respondent's counsel does not indicate the date when the case in the lower court was heard culminating in the Judgment dated 24th April, 2015. I am therefore unable to verify which of the various hearing notices was served on the applicants just before the hearing of the case in the lower court. The written submissions by the respondent's counsel indicate that the applicants' Advocates were served via registered post as shown in the affidavit of Francis Olalo sworn on 14th July, 2015 filed in the subordinate court in support of the application to set aside the subject Judgment. The applicants have denied having received any hearing/mention notices for the case in the lower court.

14. Order 42 rule 6 (2) of the Civil Procedure Rules provides that:-

“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 the application has been made without undue delay; and

(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.”

15. Although Counsel for the respondent submitted that no sufficient cause is shown by the applicants as

there is no decree or certificate of costs issued to warrant the invocation of order 42 rule 6 (2) by the applicant, I am not in agreement with the said Counsel. Section 2 of the Civil Procedure Act provides that:-

“decree” means the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a plaint”

16. The instant application has arisen as a result of a controversy that went for adjudication before Hon. Nangea (CM) who rendered himself on 16th November, 2015 on the said matter in CMCC No. 3440 of 2013 between **Georgina Sheriff versus Maries Stopes Kenya & 2 Others**. The respondent's Advocate thereafter and specifically on 11th June, 2015 gave a 7 day notice to the applicants to pay up or execution would issue against them. A copy of the said letter was attached and marked as annexure FO-2 to the applicants' supporting affidavit. It is my finding therefore, that the applicants have a sufficient cause to move this court on the application before this court.

17. In the case of **Sewankambo Dickson vs Ziwa Abby** HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala restated that:-

“ *Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal ... insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a commercial court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts.*”

18. Substantial loss in the context of order 42 rule 6(2) includes the applicant showing that he will be totally ruined in relation to an appeal if he pays the decretal amount to the respondent with no chances of recovering his money if the appeal succeeds. The onus of proving substantial loss and the fact that the respondent cannot pay back the decretal sum if the appeal is successful lies with the applicant. It is therefore not enough for a party to allege or state so, without hard facts to support the assertion. The second requirement that revolves around such an application is whether the applicant has offered security. In this instant, the applicants have expressed their willingness to offer security although they have not indicated the amount. The final thread the court has to consider is if the application has been brought to court timeously. The applicants herein filed their application expeditiously following the ruling of Hon. Nangea (CM) on 16th November, 2015. The application was filed in court on 27th November, 2015. This court has to balance the foregoing factors to arrive at a just decision.

19. In the case of **Absalom Dova vs Tarbo Transporters** [2013] eKLR, the court held:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; The appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

20. Bearing in mind the Sewankambo Dickson case (Supra), it is apparent that what constitutes substantial loss varies from one person to the next. There is no fixed denominator to measure substantial loss. It all depends on the good sense of the court and the circumstances of each case. Although the applicants have not shown the incapability of the respondent in repaying the decretal sum if the appeal fails, having considered the variables in the present application, including the fact that the applicants have pleaded that they stand to suffer professional reputational risk and that they stand to suffer substantial loss if an order for stay of execution is not granted; I hereby allow the application and make the following orders:-

(i) The applicants will deposit the decretal amount of Kshs. 693,600/= in a joint interest earning bank account in the names of the Advocates for the parties on record within 30 days from today; failing which these orders will be automatically vacated;

(ii) Costs to the applicants.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellants/applicants

Mr. Maundu for the respondent

Mr. Oliver Musundi Court Assistant