



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL MISC. APPL NO. 479 OF 2015
JAMIN MGULA ALUSIOLA (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF THE LATE
ZIPPORAH AMGROVE ALUSIOLA).....APPELLANT/ RESPONDENT
VERSUS
ELIAS THUKU.....1ST RESPONDENT/APPLICANT
PAUL MBUGUA MUGO.....2ND RESPONDENT/APPLICANT
RULING

1. The application dated 29th October, 2015 seeks orders for the extension of time within which to appeal against the judgment and decree entered against the Applicants by the Honourable Principal Magistrate(Ms) S. Atambo at the Chief Magistrate's Court Nairobi, on the 30th of April,2015. Secondly, the Applicants seek an order of stay of execution of the judgment/ decree in CMCC No. 3766 of 2011 Milimani Commercial Courts entered against the Defendants/Applicants by the Honourable trial court on 30th April, 2015 pending the hearing and determination of the intended Appeal.

2. It is stated in the affidavit in support that the judgment of the lower court was delivered on 30th April, 2015. The Applicants' are aggrieved by the said judgment and intend to appeal. However, the time within which to file an appeal has lapsed. The delay in filing the appeal is blamed on the failure of the lower court to issue a notice to the Applicant following the adjournment of the delivery of the judgment on 28th November, 2014. The Applicants have averred that they are threatened with execution. That the judgment of the lower court is for a substantial amount of money which may not be recovered in the event that the appeal is successful as the Respondent's means are unknown. The Applicants have further stated that they have a strong and arguable appeal with high chances of success and they stand to suffer irreparable loss and damage if the application is not allowed. The Applicants are ready to deposit security for the due performance of the decree.

3. In opposition to the application, the Respondent filed the grounds of opposition dated 30th November, 2015. The said grounds are as follows:-

1. That there exists another application filed under Certificate of Urgency coming up for hearing on 3rd December 2015, the same day as this in the High Court of Kenya at Nairobi being Milimani HCC MISC Application No. 479 of 2015 filed on 29th October 2015 seeking orders inter alia; stay of execution of Judgement/Decree in this Suit.

2. That the Supporting Affidavit sworn on 29th October, 2015 is incompetent and fatally defective having been sworn by a non-party and without authority.

3. That the Application has no merit and brought after inordinate and inexcusable delay to deny the Plaintiff the fruits of his judgment.

4. That the Application as drawn and taken out is defective, incapable of being taken seriously, is frivolous, vexatious and abuse of the court process.

5. That the Application has failed to meet the threshold set for grant of discretionary orders sought.

6. That it is in the interest of Justice that litigation must come to an end.

4. The application was canvassed by way of written submissions which I have duly considered.

5. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Act Cap 21 Laws of Kenya)

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“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 unreasonable 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.”

7. Under Order 42 Rule 6(2) of the Civil procedure Rules, the applicants are seeking orders of stay pending appeal from the subordinate court to the High Court. The applicants are not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**)

8. Turning to the case at hand, the judgment of the Lower Court was delivered on 30th April, 2015. The application herein was filed on 29th October, 2015. That is a delay of about six (6) months. The factual position given by the Applicant has not been rebutted by the Respondent. The delay has been explained by the Applicant.

9. The Applicants face imminent execution. Substantial loss is therefore likely to be visited on the Applicants. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

10. The Applicant has expressed his fear that the Respondent may not be able to refund the decretal sum if the appeal is successful. The Respondent has not disclosed his financial resources to the court. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

11. The Respondent has raised the issue of the pending application for execution before the Lower Court. The outcome of the same has not been shown to the court by either the Applicants or the Respondent. However, Order 42 rule 6(1) of the Civil Procedure Act provides 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 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.”

Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof,

for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

12. This court is therefore not barred from hearing the current application. The application has not been shown by any evidence that it is an abuse of the court process.

13. The Affidavit in support of the application herein has been sworn by one SANDRA NYAKWEBA, a claims director of the Applicants insurer. It is deponed that the said director is conversant with the suit and has been authorized to make the affidavit. Under the right of subrogation under the relevant insurance policy, the deponent is competent to swear the affidavit. The affidavit is not fatally defective as argued by the Respondent’s counsel.

14. To balance the interests of both parties herein, I allow the application on condition that the Applicant

deposits the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs of this application to the Respondent.

Date, signed and delivered at Nairobi this 10th day of Nov., 2016

B. THURANIRA JADEN

JUDGE