



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 509 OF 2014

ERICK OTING'U MURILLA.....APPELLANT

VERSUS

JOSEPH MUTHEE NGURE MACHARIA.....RESPONDENT

RULING

1. Before this Court is the Appellant's Notice of Motion dated 14th November, 2014 expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The Appellant seeks the stay of execution of the decree and consequential orders given on 30th October, 2014 in Nairobi CMCC No. 7661 of 2008 pending hearing and determination of this appeal.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Caroline Kimeto sworn on 14th November, 2014. She averred that this application was filed at the earliest opportunity as no execution had been threatened; that the Respondent is not well endowed financially and if the decretal sum is released to him, it will most probably be unrecoverable when the appeal succeeds thereby occasioning the Appellant substantial loss and that the Appellant is ready and willing to comply with any order given by this court.
3. The Appellant in its written submissions cited **Transbel Ltd v. Ann Mwelu Mutungi & Another (2007) eKLR** in which the parameters under which the discretion to grant orders of stay are granted. That if there is no overwhelming hindrance, a stay ought to be granted so that if an appeal is successful, the same may not be rendered nugatory. It was submitted that the application was filed less than thirty (30) days after the judgment was read. Secondly, it was stated that the Appellant is apprehensive that its property is at risk of being attached in execution of the decree which is running in excess of KShs. 650,000/= and will suffer loss on account that the Respondent's financial standing is unknown. On this point the Appellant relied on **S.S. Mehta & Sons Ltd v. Stephen Ndungu Mwaura & Another (2007) eKLR** where the burden of proving financial capability was shifted to the Respondents who failed to deny the Applicant's allegation that they earned very meagre salary. The Appellant proposed to deposit half the decretal sum basing its argument in **Transbel Ltd** case (supra) where Nambuye J held as follows:-

"That notwithstanding, the court seized of the matter is not precluded from opting for the need to preserve the amount in some neutral position so that it is easily accessed by the successful party as opposed to making parties engage in further litigation processed either in the proceedings or other subsequent proceedings to enable the successful party recover the monies paid over."

4. The Respondent opposed the application vide a replying affidavit sworn on 26th November, 2014. He

contended that an order of stay of execution was given by the trial court on the date judgment was delivered. He denied the allegation made by the Appellant that he has threatened to execute. That this matter is old having been filed in the year 2008 and he stands to suffer prejudice if execution of the judgment is stayed. He stated that this application is intended to delay and deny him the fruits of judgment and that in the event this court grants the order of stay, it should order the Appellant to deposit KShs. 458,000/= being the decretal sum and KShs. 58,325/= being costs.

5. This application is based on Order 42 Rule 6 (1) and (2). That Rule provides:-

“6.(1) No appeal or second appeal shall operate as a stay of 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.

(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 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.”

6. The above Rule was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held as follows:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

7. In the instant case, judgment was delivered on 30th October, 2014 and this application was filed on 14th November, 2014. It is clear that this application was filed less than the prescribed thirty (30) days within which it ought to have been filed. It is therefore timeous.

8. As for the substantial loss, the Appellant is apprehensive that the Respondent will be unable to refund the decretal sum in the event he succeeds. On this point **See the case of Rose Mbithe Ndeti v. Mathew Kyalo Mbobu Civil Appeal No. 86 of 2008** where the Respondent rebutted not being a man of straw and proved his financial capability. In this case, there is no such rebuttal from the Respondent. Where an applicant alleges that the Respondent is a man of straw, the burden to prove otherwise shifts to the Respondent. See the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page** where it was held as follows:-

“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.

9. For security, I am fortified by the pronouncement in **Gati v. Barclays Bank of Kenya LTD. [2001] KLR 526 at 531** that an undertaking as to damages is one of the requirements for granting an injunction and where one has been given, an injunction should issue. The Appellant herein has indicated willingness to deposit security in the following terms. (a) The decretal sum be deposited in a joint interest earning

account in the names of the firms of the advocates for the Appellant and Respondent within 21 days from the date of this ruling.

10. In view of the foregoing the application is allowed as prayed. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 10th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant.

..... for the Respondent