REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 56 OF 2015

NANCY NJOGU WAMBUGU... APPELLANT

VERSUS

MARGARET KANUGU (Suing as the personal representative of WINNIE MUENI MWANIKI... RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application on the 21st May 2015 under certificate of urgency premised on the provisions of Order 50 Rule 1 and 6, Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

It is sought an Order of stay of execution of the decree of the lower court delivered on the 28th April, 2015 subject of the Appeal filed herein, pending the hearing and determination of the appeal.

The decree is for a sum of KShs.2,409,090/= against the Appellant.

An interim order of stay of execution was issued by this court on the 22nd May 2015.

2. Upon service of the application the Respondent filed a Notice of Preliminary Objection to the application, and raised three points of law and sought hearing of the said Preliminary Objection before hearing of the substantive application. A replying affidavit in opposition to the application was sworn by the 1st Respondent on the 28th May, 2015 and filed on the 29th May 2015.

The Preliminary Objection raises the following grounds:

1. That the application dated 21st May 2015 offends the mandatory provisions of Order 42 Rule 6(1) of the Civil Procedure Rules.

2. That the Applicant has invoked two separate jurisdictions of the Court seeking stay of execution being that of the lower and the High Court whereas there has been no determination of the application filed on 6th May 2015 in the lower court and which court still has competent jurisdiction to determine the application.

3. That the Applicant's Notice of Motion dated 21st May 2015 is incompetent and the same should be struck out with costs to the Respondents.

3. Parties argued the Preliminary Objection before me on the 18th June 2015.

Rule 6(1) of Order 42 Civil Procedure Rules states:

> **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 deem 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."***

4. The Respondents submitted that the applicant, pursuant to Order 42 Rule 6(1) Civil Procedure Code, filed an application for orders of stay of execution in the trial court, and that the said application has not been prosecuted for the said court to either grant or deny the orders sought. While that application is pending, the applicant moved to this court with a similar application seeking similar orders.

My understanding of the phrase as found in the body of Rule 6(1) of order 42 Civil Procedure Code is that in the first instant the application shall be presented in the trial court and only after the said court has granted or refused to grant the prayers sought, only then does the appellate court be ceased of the "liberty" to consider the application.

The position was held in the case **National Dry Cleaners Ltd & Another -vs- Ndune (1987) KLR**. Coming to this court while a similar application is pending hearing in the trial court is premature and to say the least on abuse of the court process.

5. The applicant in her submissions stated that this court is at liberty to entertain the application regardless whether the same application is pending in the lower court or not, and urged the court to allow the application.

6. Filing a multiplicity of applications, similar in nature and seeking similar orders in different courts of competent jurisdiction without any justifiable reason is an abuse of the court process. The court was not told why the application pending in the trial court has not been prosecuted. The liberty expressed in Order 42 rule 6(1) must be read together with the express provision therein that such an application must first be presented and heard by the trial court which court can either grant or refuse to issue the orders sought, only then, the applicant is seized of the liberty. See **Asea Brown Borer Ltd -vs- Bawazir Glass Works Limited and Another HCCC No 1619 of 2000.**

7. Having so pronounced, it is my finding that the application dated 21st May 2015 was filed prematurely and therefore incompetent. The result is that the Preliminary Objection dated the 28th May 2015 and filed on the 29th May 2015 is upheld, and the application dated 21st May 2015 is struck out with costs to the Respondents.

Dated, signed and delivered in open court this 3rd day of July 2015

JANET MULWA

<u>JUDGE</u>