



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 382 OF 2015

GICHEHA FARMS LIMITED APPLICANT

VERSUS

KIMANI NGUGI T/A

TAKINA SERVICES AND SUPPLIES ENTERPRISES.....RESPONDENT

R U L I N G

By a Notice of Motion dated 8th day of September, 2015, the Applicant Gicheha Farms Limited seeks from this court an order of stay of execution of the judgment in Thika CMCC No. 35 of 2013 delivered on 29th May, 2015 and the decree issued therein against the applicant and all consequential orders pending the hearing and determination of the Application herein.

The Applicant also seeks a stay of execution of the judgment in Thika CMCC No. 35 of 2013 delivered on the 29th May, 2015 and the decree issued therein against the Applicant and all consequential orders pending the hearing and determination of the appeal.

The Applicant further seeks for enlargement of time within which to file the Appeal from the Judgment in Thika CMCC No. 35 of 2013 delivered on 29th May, 2015 and that the draft Memorandum of Appeal be deemed as duly filed.

The grounds on which the Application is premised appear on the face of the application and they include assertions that no notice of delivery of judgment was issued to the Applicant and that he became aware of the Judgment upon receiving a letter from the Respondent's Advocates informing him of the delivery of the judgment.

The Applicant further asserts that failure to file the Appeal in time was inadvertent and that the orders sought will not prejudice the Respondent in any event and that execution may issue any time.

The application is supported by the Affidavit of **ROBERT M. MBURU** the Applicant's Operations Manager and the same was sworn on 8th day of September, 2015. In it the deponent details the chronology of events leading to the application before me.

In the said affidavit the Applicant points out that the lower court matter that is CMCC No. 35 of 2013 was mentioned on 30th January, 2015 when the delivery of judgment was fixed for 20th February, 2015 and on the said 20th February, 2015, again the judgment was not ready and it was pushed to the 27th March, 2015. On the 27th March, 2015 the court was not sitting and parties were advised to check with

the clerk in the week that was following. The trial magistrate was subsequently transferred and parties were advised by the registry that judgment would be delivered but they were not given an indication when the same was to be delivered.

In the month of August, 2015 the Advocate for the Applicant Mr. William Kabaiku met the Respondent's advocate who advised him that judgment was yet to be delivered but on the 3rd September, 2015 the Applicant's Advocates received a letter from the Respondent's Advocate advising of the delivery of the judgment and demanding payment of the decretal amount. The said letter is annexed as "RM 2" and it is that letter that made the Applicants Advocates aware of the judgment.

Upon perusal of the judgment the Advocate for the Applicant were of the opinion that the judgment is not supported by the evidence adduced at the trial and their client (applicant) instructed them to appeal against the said judgment by which time, thirty days within which the file appeal had already lapsed.

He asserts that failure to file Appeal on time was caused by circumstances beyond the Applicant's control as the trial court delivered the judgment without notice to the parties.

The Applicant further avers that it has a good appeal on merit as evidenced by the Memorandum of Appeal and if a stay of execution is not issued then the intended appeal shall be rendered nugatory.

The Applicant further depones that it is likely to suffer irreparable loss should it be ordered to pay the decretal sum prior to the hearing of the Appeal as the Respondent's means of refunding the money in the event of a successful appeal are unknown. The Applicant stands to suffer irreparable loss and damage should the Respondent proceed with execution. He is ready and willing to deposit the entire decretal sum in court as may be directed by the court.

By way of opposition to the motion, the Respondent Kimani Ngugi t/a Takina Services and Supplies Enterprises, filed a replying affidavit sworn on the 11th September, 2015. The deponent avers that the Appeal lacks merit, is not arguable, is hollow, a non starter and has no chances of success. He further avers that the Applicant has not demonstrated how it will suffer irreparable loss and damage. He asserts that he is financially sound and he is capable of refunding the Applicant the decretal sum in the event that the Appeal succeeds.

He depones that he owns a business namely Takina Service and Supplies Enterprises based at Mlolongo Township which deals with contracts of installation, sales and supplies of irrigation and water plumbing materials. The said contracts are many in a year and they are worth millions. He further depones that he owns a parcel of land in Lamu known as Lamu/Siyu/468 on the beach frontage which is now valued at Ksh.100 Million and he has annexed an agreement for sale.

He further stated that he owns a shop at Mlolongo Township known as stall No. 10-12 valued at over Ksh.2 million shillings, that he owns motor vehicle registration Number KBL 129J valued at kshs.650,000/- and has attached a valuation report for the said vehicle. Lastly, he asserts that he owns a residential house at Katani just after Syokimau known as Mavoko Town Block 2/25293 measuring 0.300 Ha. He has attached his bank statements to show how his business is doing. He concludes by saying that the decretal sum is a small amount of money which he can refund in one bullet in the unlikely event that the Appeal is successful.

He states that the application has been made after an inordinate delay and great prejudice will be occasioned to him if he does not access the judgment amount soonest possible. The deposit in court of the decretal sum is uneconomical holding all factors constant as the defendant's Appeal is about reducing the decretal sum by only a small margin.

At the hearing of the application, both Advocates recorded a partial consent in the Application as follows: -

- a. By consent prayer (4) of the said application be allowed.

- b. The Memorandum of Appeal be filed within 30 days.
- c. The Cross-Appeal to be filed within 30 days upon service of the Appeal.

With the partial consent as above, the only prayer left for canvassing by the parties was prayer 3 of the Application seeking stay of execution.

Mr. Kabaiko for the applicant submitted that the Applicant has an arguable Appeal that raises serious issues and that it has high chances of success and it's only fair that the Applicant be given an opportunity to ventilate the Appeal. It was his further submission that with the new Constitution the court should allow the parties as much as possible to unhindered justice and hearing of the Appeal is a right enshrined in the Constitution. The Applicant is likely to suffer irreparable loss should the Respondent be paid the decretal sum as his means of refunding the money is not known and in his submission, when the Appellant makes such averment the burden of proof shifts to the Respondent prove his ability. He dwelt at length on this issue and had this to say on the same.

- i. Though the Respondent depones that he deals with contracts worth million of shillings, he only annexed a certificate of registration of the business and a business permit which are not prove of the financial worth of the business.
- ii. On the assertion that he owns a piece of land in Lamu valued at Ksh.100 Million, the Respondent acquired the land at Ksh.280,000/- two years ago and it is highly unlikely that the same has appreciated to Kshs.100 Million in 2 years. Further, the Respondent only attached the Sale Agreement but no evidence that the land has been transferred to him. The tile is not in his name.
- iii. On assertion that the Respondent owns a shop at Mlolongo worth Ksh.2 Million Shillings, no valuation report is annexed to show the value of the shop. Only a Sale agreement was annexed and the consideration is not disclosed.
- iv. On the issue of the motor vehicle KBL 129J, he submitted that as per the valuation report, the forced value of the same is Ksh.550,000/- and it's a 2003 motor vehicle. By the time the Appeal is heard and determined, it will have depreciated in value.
- v. About the residential house at Katani, the value has not been given and the title deed is not in his name.
- vi. As for the bank statements he argues that it gives credence to the Applicants position that the Respondent will not be able to refund the money in the event the decretal sum is paid to him. Firstly, the balance in the account as at July, 2015, is a mere Ksh.5,000/- and at some point he had even overdrawn the account and the biggest deposit he ever made was Ksh.80,000/-

On his part, counsel for the Respondent Mr. Ngila submitted that the Respondent has demonstrated that he is able to pay back the decretal sum should the appeal succeed. He avers that documents were annexed to that effect to wit the certificate of registration and the business permit which shows that the Respondent is in business and makes money, the documents for the ownership of the land in Lamu and that the value of the land has appreciated since the Respondent acquired the same.

I have carefully read and understood the Applicant's application, the supporting affidavit and the affidavit in reply and I have considered the submissions by both counsels.

The grounds for granting a stay of execution are now settled in law as was held in the Court of Appeal in the case of **Equity Bank Ltd Vs West Link MBO Ltd (2013) eKLR** that an Appeal does not operate as a bar to execution of judgment hence party seeking stay of execution pending appeal must, therefore, demonstrate that they are not using the appeal to delay justice. An application for stay pending Appeal is provided for under order 42 (6) of Civil Procedure Act. A party seeking for an order of stay of execution has to prove

- a. That a substantial loss may result to him unless the order is made and that the application has been made without unreasonable delay.
- 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.

On the first condition and on whether the Applicant herein filed his application without under delay, the counsel for the Applicant learnt about the judgment on 3rd September, 2015 when he received a letter from the advocate for the Respondent informing him about the same and demanding payment of the decretal sum. The Application herein was filed on the 8th September, 2015.

In my view the Application was filed within a reasonable time as it took the Applicant five days only to file the application and within the same period, they had to peruse the court file as deponed in Paragraph 3 of the Supporting.

Regarding the second condition of substantial loss that is likely to be suffered by the Applicant if stay is not granted, the applicant has submitted that it is unlikely that the Respondent will be in a position to refund the decretal sum to the tune of Ksh.2,700,000/- should the Appeal succeed. This point was well ventilated by Mr. Kabaiko in his submissions. In my view the documents annexed by the Respondent do not prove his capability of refunding the money to the Appellant. A certificate of registration and a business permit are not prove of the financial worth of the business, the documents in support of the house in Katani are not in his name and therefore, no prove of ownership. No valuation report has been annexed to show the value of his business at Mlolongo. With regard to the bank statement annexed to his affidavit, a casual glance at the entries made therein do not reflect a healthy account financially and I am not convinced that the Respondent would be in a position to refund the decretal sum if the same is paid to him.

On the third condition under Order 42(6), the Applicant in his Affidavit in support of the application has offered to deposit the entire decretal sum in court and Mr. Kabaiko in his submissions stated as much.

In conclusion, as the court rightly stated in the case of **Absalom Dora Vs Tarbo Transporters (2013) eKLR**.

“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 to decree holder to 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.

This court has many options of balancing out the parties rights in this case, where it decides to grant stay, it can do so on terms. Noting that the Applicant has offered to grant security for due performance of the decree in order to insulate the Respondent/Decree Holder from any loss should the Appeal be rendered in his favour.

I, therefore, make the following orders: -

- 1. The Applicant is hereby granted a stay of execution of the judgment in Thika CMCC 35 of 2013 delivered on 29th May, 2015 and the decree issued therein and all the consequential orders pending the hearing and determination of the Appeal.**
- 2. BUT ON CONDITION that the Applicant deposits the entire decretal sum in an interest earning account in the names of the counsels for both parties within the next 30 days from the date hereof; and in default the orders of stay shall automatically lapse.**

Dated and Delivered at Nairobi this 5th of November, 2015.

LUCY NJUGUNAJUDGE

In the Presence of

..... for the Applicant.

..... for the Respondent.