



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NUMBER 138 OF 2008

1. PETER NDUNG'U NGAE.....1ST PLAINTIFF/RESPONDENT
2. ANNAH WAITHERA NDUNG'U.....2ND PLAINTIFF/RESPONDENT
3. NGAE ENTERPRISES LTD.....3RD PLAINTIFF/RESPONDENT

VERSUS

JOHN MUGANE KAROMO.....DEFENDANT

RULING

1. The Applicant by his Notice of Motion dated 22nd December 2014 and brought under **Order 42 Rule 6 of the Civil Procedure Rules** seeks an order of stay of execution of the decree of the court issued against him in the judgment delivered on the 5th December 2014. It is a monetary decree in the sum of Kshs.2,758,000/= plus costs. He has filed a Notice to Appeal to the Court of Appeal and applied for proceedings timeously.

2. In his affidavit in support of the application, the applicant has offered security for the due performance of the decree by offering his title deed to a land parcel **No. Njoro/Ngata Block 1/4229**, registered in his name and with a current value of Kshs.2,500,000/= as per valuation report dated 18th March 2015 prepared by Applecross Surveyors. He believes that the security is sufficient, and that to be asked to deposit the total decretal sum in cash is oppressive and will deny him the right of appeal as he is not financially able to, as he also has family responsibilities of paying school and college fees for his three children at Jomo Kenyatta University, Tetu High School and Kirobon High School.

3. In opposing the application, the Respondents filed a Replying Affidavit sworn by the 2nd respondent. She avers that she is financially able to repay back the decretal sum should the appeal be successful. She has demonstrated her financial ability through bank statements and fixed deposits way above the decretal sums, and rental income from her properties of about Ksh.400,000/= per month. She states that she should not be kept out of her judgment fruits pending hearing of the appeal as she is able to refund the same should the appeal be successful.

4. Ms. Nancy Njoroge Advocate for the applicant urged the court to allow the application as the security offered is sufficient and relies on **Gitahi & Another -vs- Warugongo – Civil Application No. NAI 13 of 1988** where the Court Of Appeal held that, security in whatever form is adequate, that the form is immaterial so long as the opposite party is well protected and not prejudicial and the decretal sum would be available when required.

5. The Respondents through their advocate Mr. Mbiyu urged the court to dismiss the application as two conditions set out in **Order 42 Rule 6(2)** have not been satisfied, that no substantial loss that may result to the applicant should the orders be denied have not been demonstrated and that the security offered by way of deposit of a title deed into court is not sufficient security and not readily available and in any event its value is much less than the decretal sum.

He relied on the case **Trust Bank Ltd -vs- Benjamin Koruga Kibiru** and another, **Civil Appeal No. NAI 97 of 1986(2006) KLR** that all the three conditions must be satisfied for an order of stay of execution pending appeal to succeed. It is his submission that the applicant failed to demonstrate substantial loss by evidence, as is required. It was his further submission that as the Respondents are financially able to refund the decretal sum should appeal succeed then no prejudice would be occasioned to the applicant if the application is denied.

6. An application for Stay of Execution pending appeal is hangered under the provisions of **Order 42 Rule 6(2)**. Three conditions must be satisfied:

- (a) That substantial loss may result to the applicant unless the order is made and
- (b) The application has been made without unreasonable delay, and
- (c) 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.

It is the duty of the court to determine whether the applicant has met, to the satisfaction of the court, the three conditions above.

There is no dispute that the application was made without delay.

On whether substantial loss was **sufficiently** demonstrated, I shall refer to a passage in the case **Machira t/a MaChira & company Advocates -vs- East African Standard (No.2) 2002 KLR & 63 -**

“that...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgment of any decision of the court giving him success at any state.

That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal and handled----- which is to do justice in accordance with the law and prevent abuse of the court.”

7. To prove substantial loss the applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the court will therefrom determine whether such loss will ensue and if it so does, that the applicant is likely to suffer substantial injury pending the hearing of the appeal. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay of execution.

Substantial loss in its various forms is the cornerstone of granting of a stay of execution. See **Kenya Shell Ltd -vs- Kibiru & Another (1986) KLR**.

The applicant herein has stated in his supporting affidavit that he has family responsibilities, school and college fees to pay for his children. He did not however state or show any evidence of such college or school fees. It is not enough to state a fact. It must be proved. He claimed too to be a grains dealer

operating a cereals shop within Nakuru. He failed to show his income from the said business. He simply tells the court that he is unable to raise the Kshs.2,758,000/= in cash and offers to deposit his title deed to court as security.

8. I have agonised over whether there would be substantial loss to the applicant if stay is not granted. I cannot find any possible evidence to prove that substantial loss would be occasioned, sufficient enough to persuade me to grant an order of stay.

Would the denial of stay then render the pending appeal nugatory?

The applicant has shown no evidence how denial of a stay order would affect the appeal. This is a monetary decree. The Respondents have shown their ability to refund the decretal sum should the appeal be successful.

Indeed security for the due performance of the decree was offered by the applicant. As submitted by the Respondents the property offered as security would not be translated to money when it may be required. Its value is less than the decretal sum. Taxed costs of the suit, I believe, have not been added nor is interest. It cannot be said to be a sufficient security to materialise into money when required as held in the **Trust Bank Limited Case** (supra).

In its totality the applicant has satisfied only one condition as set out in **Order 42 Rule 6(2)**, that, the application was filed without delay. He has failed to satisfy this court of the other two.

Even after considering the principles of justice and fairness to both parties, the court finds no merit in the application.

Accordingly, the application dated 22nd December 2014 is hereby dismissed with costs.

Date, signed and delivered in open court this 9th day of November 2015

JANET MULWA

JUDGE