



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 529 OF 1996

KAMAU GAKUO.....PLAINTIFF /RESPONDENT

-VERSUS-

AMARJEET AHLUWALIA SINGH.....DEFENDANT/APPLICANT

RULING

1. The application before this Court is a Notice of Motion dated 10th September 2013. The same is brought under Section 1A & B of the Civil Procedure Act, Order 42 rule 6 (1) of the Civil Procedure Rules. The applicant seeks the following orders:

- i. That the Court do issue a stay of execution of the judgment delivered on 6th August, 2013, the decree herein and subsequent orders until the determination of the intended appeal
- ii. That the prohibitory orders registered against the defendant's property i.e. Murang'a Township Block 111/14 be lifted
- iii. That costs be in the cause.

2. The application is grounded on the grounds that;

- i. Upon the judgment being delivered, a stay of 30 days was granted, which period is now spent and there is a possibility of the plaintiff moving with speed to execute.
- ii. That the applicant has filed a Notice of appeal and unless a stay is granted, his intended appeal will be rendered nugatory
- iii. It is in the interest of justice.

3. The applicant filed a supporting affidavit sworn by Dr. Ahluwalia; he avers that substituted his deceased father as a defendant in this suit and has since applied to be supplied with typed proceedings and a copy of the said judgment; that the prohibition orders were registered in pursuant to the judgment of lady Justice Nambuye delivered on 11th July, 2008 which judgment was set aside by Justice D. K. Maranga on 29th March 2011 which means that the said orders have no basis and should be lifted; that he was willing and able to raise Kshs. 1.5 million which is a substantial part of the decretal amount and deposit the same in Court or in a joint savings account until the determination of the appeal; that the respondent will not be prejudiced in view of the fact that a substantial part of the decretal sum will be secured.

4. Parties filed written submissions.

5. The applicant submitted that the defendant instituted an appeal against the judgment of Justice Ogo vide a Notice of appeal dated 8th August 2013; that the application is informed by the clarity of law in

saying that an appeal shall not operate as a stay of execution; that after the entry of the said judgment a stay of 30 days was granted which period is since spent and there is a possibility of the plaintiff executing and that if the orders sought are not granted the intended appeal will be rendered nugatory and he is yet to be supplied with proceedings to enable him file the same; that he is willing to deposit Kshs. 1.5 million in Court or joint account in the names of both advocates until the determination of the appeal securing the plaintiff's decretal sum should the said judgment be sustained in the superior Court; that the current market value of the said property is in excess of Kshs. 10 million and if sold in execution there is a likelihood that the same will be undervalued; that judgment was delivered on 6th August 2013 and the application was filed on 10th September 2013 shortly after the lapse of the stay period; that Order 42 rule 1 of the Civil Procedure Rules is intrinsic in the procedure of the criteria to be followed in giving or denying an order for stay.

6. The respondent in opposition to the said application filed a replying affidavit sworn by Kamau Gakuo on 25th November, 2013. He depones that he has awaited justice since 1992 and the matter was finally determined in his favor by Lady Justice Nambuye on 11th July 2008; that upon delivery of the said judgment he extracted the decree and a Notice to Show cause why execution should not issue against the defendant and subsequently the defendant filed an application to set aside judgment which was allowed by Justice Maraga who revived the suit and substituted the defendant herein with defendant in the original suit; that on 6th August 2013 judgment was entered in his favour by Lady Justice Ougo for the cost of suit and a sum of Kshs. 1,127,000, with costs and interests from 29th March 2011; that soon after judgment he was served with a notice of appeal dated 8th August 2013 while he was in the process of extracting the decree for purposes of execution. He argues that the applicant's application is immature as he is yet to extract the decree; that the claim by the applicant that the appeal will be rendered nugatory is unfounded as the decretal sum is not in dispute and he has also not shown how he stands to suffer substantial loss; that the prohibitory orders registered under the defendant's property Murang'a Township block 111/14 is lifted he will have no means of realizing the decretal amount as that is the only known property of the Defendant and reiterated that he has waited for over 20 years for justice and that in the foregoing reasons it is not just and equitable to allow a stay of execution.

7. In an application like this one am guided by the provisions of Order 42 rule 6 (2) .The application was made without delay. The applicant has to show that he will suffer substantial loss. The applicant hasn't explained the loss he will suffer if the stay order is not granted. It appears to me that his main issue is the prohibitory orders that were issued. Though he has offered a security of Kshs. 1.5 million I find that he has failed to demonstrate the loss he will suffer if the orders sought are not granted. I therefore decline to grant the stay of execution orders as sought.

8. On the prohibitory orders, it is my view that once the judgment was set aside by Justice Maraga the prohibitory orders couldn't stand. This Court heard this case and didn't make orders on the prohibition orders. It is only in order that the same is lifted. The plaintiff can begin the process of execution a new after extracting the decree on the judgment delivered by this Court on the 6th August 2013. I therefore order that the prohibitory order registered against the defendant's property i.e. Murang'a Township Block 111/14 be lifted. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 2nd day of *May* 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Respondent

.....For the Defendant/Applicant

.....Court Clerk