



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 149 OF 2012

JOHN KAMAU GATIMU1ST APPLICANT

MACMILLAN ARODI OKERIO 2ND APPLICANT

VERSUS

EMMACULATE KEMUMA ABUYA RESPONDENT

RULING

Notice of Motion application dated 9th May, 2012 and which is expressed to be brought under order 42 rules 6, order 50 rule 6, order 51 rules 1 and 3 of the Civil Procedure Rules 2010, Section 3 and 3A of the Civil Procedure Act seeks in the main, an order for stay of the execution of the Judgment obtained in SRMCC No. 32 of 2010 Kwale delivered by the trial Court on the 9th day of June, 2010 pending the outcome of the appeal against the ruling delivered by the trial magistrate on 21st March, 2012.

The grounds are that a ruling was delivered in SRMCC No. 32 of 2010 Kwale on 21st March, 2012 dismissing an application for stay of the execution of the Judgment and decree issued on 29th June, 2010.

(b) That 30 days within which an appeal is to be lodged has since lapsed and unless stay of execution is granted, the applicants are at risk of execution and the applicants appeal will be rendered nugatory and will suffer irreparable loss and damage.

(c) That the proposed Respondent is unlikely to suffer any prejudice if the proposed appellants are granted leave to file their intended appeal out of time and any damages. Any loss is capable of compensation by way of costs if this application is allowed.

(d) That the applicant is ready willing and able to furnish such reasonable security as the Court may deem fit.

That the appellant has a good arguable appeal which has high chances of success.

That no prejudice will be suffered, as damages if any, will be compensated by way of costs.

This application is opposed on the grounds that, the delay in filing the appeal within time was not properly explained.

Further that the ruling and order in which leave is sought to file appeal out of time are not annexed to the application.

That the order granted on 21st March, 2012 was an order dismissing the applicants application with costs.

It is submitted that the order granted on 21st March, 2012 was not a positive order but a negative one. That the Court cannot issue stay orders for a negative order.

Counsel has cited the case of **Chai Warehousing Limited – Vs- Petronilla Abukwi Mombasa HCCA 167 of 2011** where Kasango Judge held,

“To order stay of execution of the dismissal of an application to open a joint account cannot by extension stay the execution of the lower Courts Judgment”.

Counsel has also cited the Court of Appeal case of **Exclusive Estates Ltd. -Vs- Kenya Posts & Anor. (2005) I EA 53** where it was held,

“The order which dismissed the suit was a negative order which is not capable of execution”.

Order 42 rule 6 (2) provides,

“No order for stay of execution shall be made under subrule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

The stay of execution sought is in respect of the Judgment delivered on 9th June, 2010.

In the Supporting Affidavit of Counsel for the applicant at paragraph 4 it is deponed that Judgment was delivered on 9th June, 2010 by Honourable Aminga - Senior Resident Magistrate in favour of the Respondent at 100% as liability Ksh. 300,000/=, General damages, Ksh. 6,500/= Special damages plus costs and interest.

Counsel for the Respondents contention is that the stay sought is in respect of the dismissal order granted on 21st March, 2012. A perusal of the Notice of Motion application dated 9th May, 2012 does confirm that the same is one of the prayer sought but the 4th prayer clearly provides for order of stay of execution of the Judgment/Decree obtained in SRMCC No. 32 of Kwale pending hearing and determination of the applicants appeal.

That Judgment was for general and special damages and costs and interest. It was not a negative Judgment and or order but a positive one.

It does not amount to a dismissal hence the authorities cited by Counsel for the Respondent are not relevant to the main application.

It is noted that the Judgment sought to be stayed was entered ex parte on 9th June, 2010. The suit was not heard on its merits. Its the applicants contention that they were not served with summons to enter appearance hence their failure to enter defence.

I have perused the Supporting Affidavit sworn by Counsel for the Applicant and in particular paragraph 8, 9, 10 and I am satisfied that plausible reasons have been given for the delay in filing the appeal out of time.

The applicants in this case are willing to deposit reasonable security pending the hearing and the determination of the appeal.

Its the applicants contention that the Respondents intend to file a declaratory suit against the Applicants Insurance company since Judgment was delivered against them and if the stay is not granted the declaratory suit will proceed and it would deny the applicants a right for their case to be heard in its merits and the appeal would be rendered nugatory.

If that is the case, then there is need to have an even playing ground by ensuring that status quo is maintained. I have perused the memorandum of appeal and I am satisfied that the intended appeal has high chances of success.

The application has merit. It is ordered that the applicants do deposit the whole of the Decretal amount in an interest earning account in the joint names of the Advocates for the applicants and those of the Respondents within thirty (30) days from today.

Stay orders are granted predicated on that condition. In default stay orders to stand vacated. Leave to file appeal out of time granted. The memorandum of appeal annexed to be deemed as duly filed upon payment of requisite fees.

Costs in the cause.

Ruling delivered dated and signed this **10th** day of **June, 2014**.

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M. MUYA

JUDGE

10TH JUNE, 2014

In the presence of:-

Ontwere holding brief Nyabena