



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 64 of 2012

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(Appeal from SRM Hon. C. L. Yalwala in BGM CMCC No.56 of 2010)

HASSAN MAYENDE SHABAN **APPELLANT**

VRS

DORCAS NYAKOA INJENDI **RESPONDENT**

RULING

Principles governing stay of execution

[1] The principles governing stay of execution pending appeal are settled and crystallized under Order 42 Rule 6 of the CPR that:

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

[2] A great many cases have been decided on these principles and I do not wish to multiply them save quote from the case of Bungoma HCCA No.42 of 2011 on substantial loss that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail,.....”

[2] The Applicant has applied for:

- (i) Stay of execution of the ruling and order made on 3rd October 2012 and all consequential orders
- (ii) Stay of execution in respect of objection proceedings particularly the order dated 3/10/2012 in BGM CM CC No.56 of 2010 pending determination of appeal from the said order.

[3] I agree with counsel for the Respondent that the order of dismissal of the objection proceedings was a negative order and there is no particular act that was ordered that is capable of being stayed. I have

said time and again that parties and their advocates should draft their pleadings meticulously and in a very clear manner that the court easily ascertains what they are praying for. Many counsels have engaged in what I call flagrant violation of procedural rectitude in the hope that Article 159 (2) (d) of the Constitution will aid their default. I do not think this is what the Constitution intended. Article 159 (2) (d) should not be taken to have rendered procedural rectitude obsolete, or become a panacea for all ills in litigation, particularly those that parties should have avoided.

[4] The application does not seek stay of execution of the decree of the lower court. It is seeking stay of the order dismissing the Applicant's objection proceedings. I do not know what use an order staying execution of the order made on 3/10/2012 will serve. However from the supporting affidavit, it is clear that the Applicant needs a stay of the execution of the decree by way of attachment and sale of the animals proclaimed on 27/7/2012. From the annexure HMS-1 and the submissions by the Applicant, it is also discernable that the Applicant is seeking for stay of sale of the attached animals. On that basis, despite the careless manner the prayers in the application are crafted, I feel the matter is properly before the court for determination. But as I said earlier, parties should disclose from the pleadings, what orders they are seeking from the court to avoid much precious judicial time being wasted on deciphering the relief being sought.

[5] Having said that, I retreat to the thresholds set under Order 42 rule 6 of the CPR.

Is there unreasonable delay?

[6] The Applicant filed this application on 19/10/2012 barely 16 days from the date of the trial court dismissed the oral application for stay made by the Applicant before that court. There is therefore no unreasonable delay in bringing this application.

Will substantial loss occur?

[7] Are there state of facts which exist as to make the prospects of the appeal herein barren venture? See the case of BGM HCA No.42 of 2011 on this. The Appellant claims to be the owner of all the animals that have been proclaimed and the animals that have been proclaimed and these are his only source of livelihood. If his appeal is successful, it will be pious engagement unless the sale of the animals by way of auction is not stopped. I believe that aspect of the animals being a source of livelihood is not far-fetched or unfounded. It is a real fact of life, and people are known, to depend on domestic animals and dairy products for eking their lives and that of their families. This is not a matter that can be reduced to one of monetary compensation. For that reason I am convinced substantial loss would occur if an order of stay is not granted. The appeal has prospects of success.

On security

[8] Stay of execution under Order 42 Rule 6 is conditional upon such security being given by the Applicant for the satisfaction of the decree should he fail in his appeal. I shall grant stay of execution upon the following terms. The Appellant shall deposit in court within 45 days;

- (a) The entire decretal sum, and
- (b) A further sum of Ksh.15,000/= as security for the attachment fee.

Dated, signed and delivered in open court at Bungoma this 11th day of April, 2013.

F. GIKONYO
JUDGE

In the presence of:

Mumalasi for Respondent

Ndengwa Waweru for the Appellant

Khisa Court Assistant

F. GIKONYO

JUDGE