



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 7 OF 2019

MAJOR GENERAL (RTD) PAUL J. OPIYO.....APPELLANT

=VERSUS=

JUDITH A. GUSERWA.....RESPONDENT

RULING

The respondent brought a suit against the appellant in the Chief Magistrate's Court at Milimani Commercial Court ("lower court") in the year 2010 namely, Milimani Commercial Court CMCC No. 1572 of 2010, Judith A. Guserwa vs. Major General(Rtd) J. Opiyo ("the lower court suit") seeking judgment in the sum of Kshs.1,537,977/= as special damages together with interest thereon at the rate of 14% per annum with effect from 1st April, 2009. The respondent also claimed general damages for breach of contract. On 12th February, 2018, the lower court entered judgment for the respondent against the appellant as prayed in the plaint.

The appellant who was dissatisfied with the said decision of the lower court did not file an appeal within the prescribed period. On 11th May, 2018, the appellant filed a miscellaneous application in the High Court namely, Nairobi High Court Civil Division Misc. Application No. 271 of 2018, Major General(Rtd) J. Opiyo vs. Judith A. Guserwa seeking a stay of execution of the judgment of the lower court pending the hearing and determination of an appeal he intended to lodge against the decision and enlargement of time within which to file the intended appeal. The appellant's application in the High Court was heard by Njuguna J. who in a ruling delivered on 19th July, 2018 declined to grant an order of stay of execution but extended the time within which the appellant was to file the appeal by 14 days from the date of the ruling.

Once again, the appellant did not file the appeal within the 14 days' period that was granted by the court. The appellant filed the present appeal on 3rd August, 2018, one (1) day after the expiry of the extra time that was granted by the court.

On 28th September, 2018, the appellant brought another application in the appeal herein by way of Notice of Motion dated 27th September, 2018 seeking a stay of execution of the judgment of the lower court that was delivered on 12th February, 2018. The application was amended on 20th December, 2018. In the amended Notice of Motion dated 14th December, 2018, the appellant sought the following main prayers;

1. That the time within which the appeal was to be filed be enlarged by one (1) day.
2. That there be a stay of execution of the judgment and decree of the lower court made on 12th February, 2018 pending the hearing and determination of the appeal.
3. That in the alternative to prayer (2) above, pending the hearing and determination of the appeal, the respondent be restrained by an order of injunction from executing the judgment and decree of the lower court made on 12th February, 2018.
4. That further in the alternative to prayer (2) above, prior to executing the judgment and decree of the lower court made on 12th February, 2018, the respondent does give security in the sum of Kshs.2,000,000/= for restitution of any property which may be taken in execution of the judgment and decree of the lower court made on 12th February, 2018.

The appellant's application was brought on the grounds that the appellant filed the appeal herein out of time by one (1) day because, on the last day when the appellant was to file the appeal, the court file was not available at the registry due registry re-organisation exercise which was taking place at Milimani Law Court from 1st August 2018 to 15th September, 2018. The appellant averred that his appeal was arguable. The appellant averred further that the court had jurisdiction to grant injunction pending appeal and also to order the respondent/decree holder to furnish security for the restitution of any property that may be taken in execution of the decree the subject of the appeal before execution commences. The application was supported by affidavit, further affidavit and supplementary affidavit sworn by the Appellant on 19th December, 2018, 24th January, 2019 and 18th February, 2019 respectively.

The application was opposed by the respondent through a replying affidavit sworn on 24th January, 2019. The respondent contended that the appellant's application was bad in law for being *res-judicata* a similar application having been heard and granted partly on 19th July, 2019 by the High Court in Misc. Civil Application No. 271 of 2018 aforesaid. The respondent averred that the High Court extended the time within which the appellant was to file the appeal by 14 days but dismissed the prayer for stay. The respondent averred that the appellant had not laid any basis for the prayers sought. The respondent averred further that the appellant had not established that the appeal would be rendered nugatory if the application was not allowed and as such the appellant would not suffer any harm. The respondent averred that the application was frivolous and calculated to deny the respondent the fruits of the judgment that was delivered in her favour.

The appeal and the appellant's application were transferred by the High Court to this court on 26th February, 2019. The application was heard on 10th July, 2019. In his submission in support of the application, the appellant's advocate Mr. Amolo reiterated the contents of the appellant's affidavits in support of the application. The appellant submitted that the delay in filing the appeal within the time that was extended by the court was explained and was excusable. The appellant submitted further that the appeal would be rendered nugatory if the stay sought was not granted in that the only attachable assets which the appellant had were household goods and if the same were attached, his family would suffer. The appellant's advocate submitted further that the appellant had an arguable appeal. The appellant's advocate submitted that the court had power to extend the time within which the appeal was to be filed and that the delay in the filing of the appeal was not inordinate. On the issue of security, the appellant's advocate stated that the appellant was ready to deposit in court a sum of Kshs.500,000/=. He submitted that the appellant was a pensioner and as such could not afford more than what he had offered to pay.

In her submissions in reply, the respondent who appeared in person submitted that the application was mischievous and misconceived. The respondent submitted that the appellant sought an order of stay in the High Court and was denied and as such could not lodge another application for stay. The respondent submitted that the only option that was available to the appellant was to file an appeal against the High Court decision refusing to grant a stay. The respondent submitted that the judgment entered by the lower court was valid and binding and that for the same to be stayed, the appellant had to provide security for the due performance of the judgment. The respondent submitted that there was no evidence that the appellant was prevented from filing the appeal on time by the reorganisation of the court registry. The respondent submitted that the appeal by the appellant had no merit and that the application for stay was *res judicata*. The respondent submitted that in the event that the court was inclined to grant the stay sought, the appellant should be ordered to deposit the entire decretal amount in court as security.

I have considered the appellant's application and the response thereto by the respondent. The appellant's application had four (4) limbs. The appellant sought, extension of time within which to file the appeal, a stay of execution pending the hearing of the appeal and two alternative prayers in the event that the court was not inclined to grant a stay. With regard to the prayer for extension of time within which to appeal, I am satisfied that good and sufficient reasons have been given by the appellant for his failure to file his appeal within the 14 days that was extended by the court. I am also of the view that the delay of one (1) day was not inordinate. The court is aware and takes judicial notice of the fact that there was reorganisation of the court registries at Milimani Law Courts in August and part of September, 2018 which affected the registry operations in all courts at Milimani. For the foregoing reasons, I am inclined to grant to the appellant extension of time within which to file the appeal.

With regard to the prayer for stay of execution, I am in agreement with the respondent that the same is *res judicata*. The appellant had sought a stay of execution of the judgment of the lower court in the High Court in Misc. Civil Application No. 271 of 2018. The application was argued before Njuguna J. who in a ruling delivered on 19th July, 2018 held that the appellant had not established valid grounds to warrant a stay of the lower court judgment. What is before me is not an application for review of the decision of Njuguna J. but a fresh application for a stay of execution of the same judgment of the lower court. The issue having been raised, considered by the court and a decision on merit made, I have no jurisdiction to reconsider the same. The fact that the appellant has now filed an appeal does not make the present application for stay different from the one that was determined by Njuguna J. In the earlier application before Njuguna J, the appellant had annexed to his affidavit in support of the application, a draft memorandum of appeal which the court considered.

I wish to add that even if I was to consider the stay application on merit, I would still not have granted the same. The appellant has not placed any new material before me that would persuade me to depart from the decision of Njuguna J. The lower court decree was a money decree. The appellant has not convinced this court that he will suffer substantial loss if the decree is not stayed. As observed by Njuguna J., the appellant has not demonstrated that the respondent would not be able to refund the decretal amount in the event that the appellant succeeds in his appeal. The other issue raised by the appellant concerned his inability to pay the decretal amount. The inability of a judgment debtor to satisfy a decree cannot be a ground for granting a stay of execution. It is my finding that the stay application has no merit.

As I have mentioned earlier, the appellant sought two (2) alternative prayers in the event that a stay order was not granted. In his submissions, the appellant's advocate did not lay any basis for these alternative reliefs. I am in agreement that this court can grant an injunction pending appeal in appropriate cases in exercise of its appellate jurisdiction. However, save in exceptional circumstances, such order can only be given if the injunction was sought in the lower court and denied. This court has no jurisdiction to grant an injunction to restrain the execution of a valid monetary decree that has neither been stayed nor set aside. The only option that was open to the appellant in my view was to apply for a stay of execution which he did. Having failed to secure a stay, the appellant cannot obtain the order through the back door by seeking an injunction. For the other alternative prayer seeking an order for security to be furnished by the respondent before commencing execution, no basis was laid for the same. As I have stated earlier, the appellant has not demonstrated that the respondent would not be able to refund the decretal amount in the event that the appeal succeeds.

The upshot of the foregoing is that the appellant's amended Notice of Motion dated 14th December, 2018 succeeds in part. The time within which the appellant was to file the appeal is extended up to and including 3rd August, 2018 and the appellant's Memorandum of Appeal dated 1st August, 2018 and filed on 3rd August, 2018 is deemed as having been filed within time. The prayer for stay of execution and the alternative prayers for injunction and security are dismissed. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 24th day of October 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Agina h/b for Mr. Amolo for the Appellant

Ms. Musa h/b for Mrs. Guserwa for the Respondent

C. Nyokabi-Court Assistant