



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
CIVIL APPEAL ELC NO. 196 OF 2017

DEKOMA SLAUGHTER HOUSE MEAT

VENDORS & LIVESTOCK

DEALERS CO-OPERATIVE SOCIETY.....APPLICANT/APPELLANT

VERSUS

MAINA MAMO MATO.....RESPONDENT

(Being an appeal from the Judgment and Award of the Co-operative

Tribunal in Tribunal case No. 469 of 2010 at Nairobi

delivered on 2nd December, 2016)

RULING

The matter for determination is the ***Notice of Motion*** application dated ***25th January 2017***, brought by the appellant herein and is brought under Order 22 Rules 22, Order 51 Rule 1 ***of the Civil Procedure Rules and Sections 3A, 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law.*** The applicant has sought for the following orders:-

1) *Spent.*

2) *Spent.*

3) *That there be a stay of execution of the aforementioned Judgment delivered by the Co-operative Tribunal in the case No. 469 of 2010 between Maina Mamo Mato versus Dekoma Slaughter House Meat Vendors & Livestock Dealers Co-operative Society, on the 2nd December, 2016 pending the hearing and determination of the Appeal.*

4) *That costs of this application be provided.*

This application is premised upon the grounds stated on the face of the application and on the ***supporting Affidavit of Hidris Haide***, the Chairman of the Cooperative Society Loan. These grounds are:-

1. ***That a Memorandum of appeal has been filed. Annexed hereto and marked exhibit HH-3 is a***

copy of the said Memorandum of Appeal.

2. That the Applicant/Appellant may be unable to recover the Decretal amount from the Respondent because the Respondent does not have known means that can be used to refund the decretal amount or known whereabouts where he can be found for the purposes of recovering the decretal amount in the event that a stay pending appeal is not granted and the applicant is successful in the appeal.

3. That the society is ready and willing to provide such security as this Honourable Court may deem fit for the due performance of such decree or order as may ultimately be binding upon it.

4. That in the absence of the Orders sought for herein being granted, the applicant will suffer substantial loss.

In his *supporting Affidavit*, **Hidris Haide** averred that he is the Chairman of the appellant herein and thus competent to swear the said *affidavit*. He also averred that on **2nd December, 2016**, the Cooperative Tribunal delivered a Judgment in favour of the Respondent against the appellant as is evident from *annexture HHI*. Further that the appellant has been aggrieved by the said Judgment and has issued instructions to their advocates to file an appeal against the said judgment. The *Memorandum of Appeal* to that effect was annexed as **HH3**.

It was his allegation that the appellant may be unable to recover the decretal amount from the Respondent because the Respondent does not have known means that can be used to refund the **decretal amount** or known whereabouts where he can be found for the purpose of recovering the **decretal amount** in the event that a stay pending appeal is not granted and the applicant is the successful in the appeal. The deponent contended that the society is ready and willing to provide such security as the court may deem fit for the due performance of such decree or orders as may ultimately be binding upon it. He also alleged that in the absence of the orders sought herein, the applicant will suffer substantial loss.

The application is opposed and **Maina Mamo Mato**, the Respondent herein filed a *Replying Affidavit* sworn on **31st March, 2017** and averred that the instant application was not timeously filed since the decision appealed against was made on **2nd December, 2016**, and the instant application was filed almost 2 months later. That he has been informed by his advocate on record that a condition precedent of such an application is that it has to be made expeditiously which is not the case herein. Further that he has been informed by the said Advocate that the appeal is out of time and does not lie as it was filed after lapse of 30 days and no leave to file out of time was granted.

He further averred that the instant application is incompetent and should be dismissed with costs. He also deponed that he has been informed by his advocate on record that the applicant has not undertaken to secure his costs at all or even offered any security and therefore he is seeking an open ended blanket stay of execution which this court cannot grant. It was his further contention that there was no basis for the appellant to allege that the Respondent cannot avail such funds as may be due from him in the event the appeal is successful.

The court directed that the instant application be canvassed by way of written submissions. In compliance thereto, the law firm of **Ochieng Ogutu & Co Advocates**, for the **Appellant/Applicant**, filed their *written submissions* on **2nd May, 2017**, and urged the court to allow the instant application. The applicant relied on **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which states:-

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 the due performance of such decree or order as may

ultimately be binding on him has been given by the applicant.

The appellant further relied on various decided cases among them the case of ***Corporate Insurance Co. Ltd vs Emmy Cheptoo Letting & Puma Car Ltd, Civil Appeal No. 124 of 2014***; where the Court held that;

“The 1st Respondent exhibited a copy of the title deed to LR No. Nandi Hills/Kosoiyoo/BL 1/423 measuring 300 Hectares registered in his name and a valuation report for plots no. LR.No. 330/726 & 330/461/1, Anglican Heights Estate, Lavington Nairobi. In my view, the 1st Respondent discharged the evidential burden of proving that she owns valuable asset to wit, land and buildings which are under construction. The respondent does not merely state that she owns some property. She adduced evidence to prove her allegation”.

It was submitted that the Respondent has failed to provide such evidence and he has therefore not demonstrated his ability to refund the ***decretal sum***, if he is paid the same and the said appeal is successful. It was further submitted that such inability to refund the ***decretal sum*** may occasion substantial loss to the appellant.

The applicant also relied on the case of ***Gicheha Farm Ltd vs Kimani Mwangi T/A Taking Services & Supplies Enterprises (2015) eKLR*** where the Court held that;

“This Court has many options of balancing out the parties herein in this case, where it decides to grant stay, it can do so on terms...I therefore make the following orders: 1. The applicant is hereby granted a stay of execution of the judgment 2. But on condition that the applicant deposits the entire decretal sum in an interest earning account in the name of the counsels for both parties within the next 30 days.

Further, the applicant also relied on the case of ***John Mwangi vs Joseph Ndiritu Wamathai (2016) eKLR*** where the court held that;

“a judge should not refuse a stay if there are sound grounds of granting it”.

The Respondent herein did not file his written submissions despite having been granted several opportunities to do so.

The court has now carefully considered the instant ***Notice of Motion Application***. In general, the annexure thereto, the written submissions cited authorities and the relevant provisions of law. The issue of stay of execution is governed by order 42 Rule 6(2) and the conditions that should be considered are;

- (a) Whether the applicant will suffer substantial loss if stay is not granted.***
- (b) Whether the application has been brought without unreasonable delay and;***
- (c) Whether the applicant has given security for the due performance of the decree.***

As the court embarks in determining whether to allow the instant application or not, it will take into account that grant of stay is discretionary and the said discretion must be judicially exercised. See the case of ***Canvas Manufacturing Ltd vs Stephen Reuben Karindutu, Civil Appeal No. 158 of 1994***.

Further, the court will also take into account that stay of execution should be granted if refusal would render the appeal nugatory. However, the court should be cautious not to deny the successful party the benefit of judgment just because he is poor and financial inability of a decree holder solely is not a reason for allowing stay, see the case of ***Stephen Wanjohi vs Central Glass Industries Ltd, Nairobi High Court Civil Case No 6726 of 1991***, where the Court held that:-

“For the court to order a stay of execution there must be:-

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security

and the grant of stay is discretionary”.

The court will also be guided by the fact that as it determines the application, it will ensure that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and that the Respondent who is the successful litigant is not denied the fruit of his judgment.

It is evident that the **Respondent** herein had filed a claim at the **Cooperative Tribunal** seeking for various prayers against the appellant herein. However, after the full hearing of the said claim, judgment was entered in favour of the claimant therein (Respondent herein) for a refund of **Ksh 149,000/=** together with interest on the sum at court's rate from the date of filing the suit to payment in full and costs of the suit.

The appellant herein was aggrieved by the said Judgment and it filed a **Memorandum of Appeal** on **4th January, 2017**, and the instant application. It is evident that the said application is opposed. The question now for determination is whether the applicant is deserving of the orders sought.

As provided by **Order 42 Rules 6(2)** the **applicant** has an obligation to establish that it will suffer substantial loss if stay is not granted. In the averment made by the appellant and the submissions, it is apparent that the appellant is apprehensive that since the Respondent's whereabouts is not known, he may not be in a position to refund the **decretal sum** if the appeal is successful. However, courts have often time held that a successful litigant should not be denied the fruits of his/her judgment merely because he is poor. Further as the court held in the case of **Stephen Wanjohi vs Central Glass Industrial Ltd (supra)** financial ability of a decree holder should not be the sole reason of allowing a stay.

The applicant herein had a duty to show what substantial loss it would suffer if it paid the **decretal sum** to the Respondent herein. It is the applicant who had alleged that the Respondent has no known place of abode. It was upon the said appellant to prove that allegation but not for the Respondent to provide evidence of his whereabouts.

The court finds that the applicant has not been able to establish that it will suffer substantial loss if stay is not granted.

On the second condition, it is evident that the judgment was entered on **2nd December, 2016** and **Memorandum of Appeal** was filed on **4th January, 2017**. Thereafter this application was filed on **25th January 2017**. Given that in December the time between **21st December** and **13th January** is not counted, this court finds that the application herein was filed within a reasonable time and there was no unreasonable delay exhibited at all by the **applicant/appellant**.

On security, the court finds that the appellant is willing to deposit the **decretal sum** in an interest earning account of both advocates and/or in court. However, the applicant has been unable to substantiate that it will suffer substantial loss which is the cornerstone for grant of stay of execution. The court finds that the issue of security herein does not apply. The Respondent herein is the successful litigant and should not be deprived of the fruits of his judgment on mere allegations that the applicant is apprehensive that if appeal is successful, he may not be able to refund the **decretal sum** as his whereabouts is unknown. However, the appellant did not establish how it would suffer substantial loss if the **decretal sum** is paid to the Respondent.

Having now carefully considered the instant application, the court finds and holds that the

applicant/appellant did not provide sufficient materials to this court to enable it exercise its discretion in granting the order of stay of execution as sought. Consequently, this court finds that the **Notice of Motion Application** dated **25th January, 2017** is not merited. The said application is dismissed entirely with costs to the **Respondent**.

Further, the appellant should prepare the appeal for hearing expeditiously by filing the Records of Appeal within a period of **30 days** from the date hereof and thereafter set the Appeal for **direction before the Judge** as provided by **Sections 79(B) and 79(c) of the Civil Procedure Act** so that the Appeal can be given a hearing date.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of March 2018.

L. GACHERU

JUDGE

In the presence of

N/A for Appellants/Applicants

N/A for Respondents

Lucy - Court clerk.

Court – Ruling read in open court in the absence of the stated advocates for the parties and the parties.

L. GACHERU

JUDGE

9/3/2018