



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL 25 OF 2018

MOSES NGARE.....APPELLANT

VERSUS

LEONARD BAIMUNYA..... RESPONDENT

RULING

1. Before Meru chief Magistrate's court case No. 141 of 2010, the present appellant was the plaintiff while the respondent was the defendant. The matter was dismissed and defendant was awarded costs, which were assessed at Shs. 163, 495. Plaintiff thereafter filed two applications one for reinstatement of the suit and the other for stay. Both applications were dismissed vide a ruling dated 26.7.2018 which prompted this appeal. The memorandum of appeal was filed on 3.8.2018 and thereafter the present application was filed on 28.8.2013.
2. Applicant/appellant is seeking for stay of execution of the court order of 26.7.2018 and the execution for costs thereof pending the hearing and determination of this appeal.
3. The application has been opposed vide a replying affidavit filed on 27.9.2018. The application was argued orally on 25.9.2018.
4. I have considered all the arguments raised herein. What the applicant is saying is that he stands to be committed to civil jail as the notice to show cause has already been given a date.
5. The guidelines with regard to the application of this nature are to be found under order 42 Civil Procedure Rules. **Order 42 rule (6) (2) (a, b) provides that:** *"No order for stay of execution shall be made under sub rule (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"*.
6. The court must be satisfied that substantial loss may result to the applicant. Applicant avers that he stands to be committed to civil jail. The question is, what is the applicant's stand on the notice to show cause?. Is it that he is not in agreement with the costs assessed?. Is it that he doesn't have the kind of money mentioned as costs or is it a case where he fears that he would not recover such costs from the Respondent?. This is the case for the appellant and he was duty bound to bring forth all the material facts in support of his claim.
7. In the case cited by the respondent **"Kenya Power & lighting Co. Ltd vs Esther Wanjiru Wokabi, Kerugoya HCCA NO. 326/2013**, it was held that *"it had not been proved that the assessed costs payable to the respondent is such a colossal sum of money that its payment would adversely affect the applicant's operations..... The applicant would in all probability be able to recover the money from the respondent if it succeeds in its appeal....."*.
8. In the case of **Beatrice Wambui Kabui & 7 others vs Stephen Kimotho Kabui (2016) eKLR ELC No. 29/12 B Kerugoya** it was held that the court must strike a balance between two competing interests. The court further made reference to the case of **Machira t/a Machira & Co. Advocates vs East African standard (no. 2) 2002 eKLR 63**, where it was stated that; **"In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay"**.
9. And in the case of **Global & Travels Limited Nairobi Winding up Cause No. 43 of 2000** as quoted in **Kenya Power & Lighting Co. Ltd vs Esther Wanjiru (Supra)** it was stated that **"As I understand the law, whether or not to grant a stay of proceedings of further proceedings on a decree or order appealed from is a matter of Judicial discretion to be exercised in the interest of justice....."**.
10. It follows that ultimately the court's duty is to administer justice taking into account the interests of all the parties. I therefore find that it is necessary to set terms, and in my view, provision of security is important.

11. I proceed to grant the following orders:

(i) There is to be a stay on execution of costs on condition that applicant/appellant deposits the sum of Kshs.163, 495 into this court within 30 days from the date of delivery of this ruling otherwise the order of stay shall lapse.

(ii) Respondent is awarded costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17TH DAY OF OCTOBER, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet

Ngunjiri holding brief for Soi for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE