



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 10 OF 2015

FAITH WANJIRU WILSON.....APPELLANT

VERSUS

CHARITY MUTHONI WANJOHI.....RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 21ST APRIL 2015 BY HON. ANDAYI W.F – C.M IN KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL CASE NO. 191 OF 2013)

RULING

This is in respect to the applicant’s Notice of Motion dated 7th April 2016 seeking the following orders:-

- 1. Spent.**
- 2. Spent.**
- 3. That the Honourable Court be pleased to issue an order for stay of execution of the decree delivered on 20th November 2014 and/or any other orders granted thereafter pending hearing and determination of the appeal**
- 4. That costs be provided for.**

The application is supported by the affidavit of the applicant **FAITH WANJIRU WILSON** in which she has deponed, inter alia, that the main suit proceeded without her knowledge and on 10th February 2015, she filed an application to set aside the judgment. That application was dismissed on 21st April 2015 and so she filed this appeal. That the appeal is arguable and since the respondent is seeking to execute the decree, it is in the best interest of justice that the proceedings be stayed.

The application is opposed and in a replying affidavit dated 18th April 2016, the respondent **CHARITY MUTHONI WANJOHI** has deponed as follows:-

- That the application is frivolous, vexatious and an abuse of the Court process.**
- That the applicant has not preferred any appeal from the judgment or decree in this case and has instead filed an appeal from the ruling delivered on 21st April 2015 which has been brought over one year after the filing of the appeal.**
- That the respondent is not even aware about the appeal and the applicant has not even**

demonstrated how she stands to lose if execution proceeds.

Submissions on the application have been filed both by **IKAHU NGANGAH** advocate for the applicant and the respondent in person.

I have considered the application, the rival affidavits and the submissions by counsel and the respondent.

The application is premised under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** and **Sections 1A, 1B and 3A of the Civil Procedure Act**.

Section 1A, 1B and 3A of the Civil Procedure Rules set out the overriding objectives of the **Civil Procedure Act and Rules** which are to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Parties are also obliged to assist the Court achieve these objectives.

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules grants the Court the power to stay execution or proceedings pending appeal. It provides:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may, for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) 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”. Emphasis added

It is now well settled that whether or not to grant a stay of execution or proceedings is a matter of judicial discretion which must be exercised judicially and not capriciously or whimsically. It is clear from the wording of **Order 42 Rule 6 (2) of the Civil Procedure Rules** that for an applicant to succeed in an application of this nature, he must satisfy the following conditions:-

- 1. He must demonstrate that unless the order for stay is granted, he might suffer substantial loss.***
- 2. He must make the application without undue delay and,***
- 3. He must give such security as the Court may order for the due performance of such decree or order as may be ultimately binding on him.***

The cornerstone of an application for stay pending appeal is substantial loss. As was stated by **PLATT Ag. J.A** (as he then was) in **KENYA SHELL VS BENJAMIN KARUGA KIBIRU & ANOTHER 1986 K.L.R 410**

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”.

I have perused the eleven (11) paragraphs of the applicant's supporting affidavit and also the grounds upon which the application for stay is premised and I do not see any reference to the substantial loss that she may suffer if no stay is granted. Instead, the applicant refers to her appeal being arguable and that it is in the interest of justice that an order of stay be granted. Whether or not the appeal is arguable is not among the conditions provided for under **Order 42 Rule 6 of the Civil Procedure Rules**. The applicant has not shown what substantial loss, if any, she will suffer if the order of stay is not granted. She is not therefore entitled to the orders sought.

Secondly, such an application is supposed to be "***made without un-reasonable delay***". The Notice of Motion seeks the stay of execution of the decree delivered on 20th November 2014 and/or any other orders granted thereafter pending the hearing and determination of the appeal. I have perused the appeal itself and it is not against the judgment delivered on 20th November 2014 but rather, it is against the ruling of **HON. Mr. ANDAYI W. FRANCIS** delivered on 21st April 2015. Either way, whether the application is in respect to the judgment delivered on 20th November 2014 or the ruling delivered on 21st April 2015, it is clear that there is undue delay in filing it in April 2016. The delay is between 1 to 2 years. The applicant has deposed in paragraph six (6) of his supporting affidavit that she requested for certified copies of typed proceedings and judgment on 22nd May 2015. A party does not require the proceedings to file an application for stay of execution. There is therefore no reason why it took a year to file this application. It must therefore be dismissed.

The applicant also invoked the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act – the Oxygen rules**. Those provisions embody the overriding objectives of the **Civil Procedure Act and Rules** which are designed to promote the just determination of proceedings, efficient disposal of the business of the Court, the efficient use of available judicial and administrative resources and the timely disposal of proceedings. It is also provided in **Section 1A (3) of the Civil Procedure Rules** that a party and his advocate have a duty to assist the Court in furthering those objectives. The applicant, as I have already found, took a whole year to file this application. This is contrary to the rules which promote the timely disposal of proceedings. A party in breach of the rules of the Court cannot evoke the same rules to invoke the Court's powers in his favour.

Finally, and as I have indicated above, the appeal filed herein is against the ruling of **HON Mr. ANDAYI W. FRANCIS CHIEF MAGISTRATE** delivered on 21st April 2015. That ruling dismissed the applicant's application to set aside the judgment delivered on 20th November 2014. It follows therefore that there is no appeal filed against that judgment. And unless there is an appeal against that judgment, this application, in my view, serves no useful purpose.

Ultimately however, the applicant has not demonstrated what substantial loss she will suffer if the stay is not granted. Further, she did not file this application without undue delay as the ruling was delivered on 21st April 2015 and this application was filed on 7th April 2016 a whole one year later.

The up-shot of the above is that the applicant's Notice of Motion dated 7th April 2016 is devoid of merit. It is dismissed with costs.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016

Ruling dated, delivered and signed in open Court this 11th day of November 2016

Mr. Macharia for Mr. Ngangah for Appellant present

Respondent present in person.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016