



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 232 of 2007

TRANSBEL LIMITED.....APPELLANT

VERSUS

ANN MWELU MUTUNGI (suing for and behalf of the estate of

MICHAEL MUTUNGI (deceased).....1st RESPONDENT

WHITESTONE AUCTIONEERS (K) LIMITED.....2ND RESPONDENT

RULING

The Appellant/Applicant has come to this Court complaining that a judgment has been given in the Chief Magistrate's Court case No.1215 of 2003 in favour of the Respondent and against the Appellant. The Appellant has become aggrieved by that judgment and has put in place 26 grounds of appeal. It is indicated in the grounds of appeal that the decision was made on 5.3.2007. The appeal was filed on 3.4.2007. The application for stay is dated 24.4.2007 and filed the same date. Temporary stay was granted by this court on 24.4.2007 whereby the entire decretal sum has been deposited in court. The temporary stay was granted in line with prayer 2 of the application which sought stay pending hearing of the application inter parties. The orders being sought in this ruling are in respect of prayer 3, 4 and 5 of the application. Prayer 3 is for stay pending appeal, prayer 4 is for the applicant not to be punished in payment of the Auctioneers charges and prayer 5 is for provision for costs of this application.

Being an application for stay the applicant is required to satisfy the ingredients for granting stay pending appeal as laid out in order 41 rule 4(1) and (2) of the Civil Procedure Rules and principles established by decisions of both the superior court and the court of appeal. One such decision of the superior court is the case of **CENTRE SHOP VERSUS PHARIS GITARI AND ROSEMARY GACHARI, MERU HCCC A 12 OF 2005**. I. Lenaola J. at page 2 of the ruling set out the conditions:-

- (1) That substantial loss may result to the applicant unless the order is made.
- (2) That the application has been presented without unreasonable delay.
- (3) That security as the court may order and binding on the applicant has been made.

There is an additional one that the appeal is arguable and if stay is not granted the same will be rendered nugatory.

In support of this application it is the contention of the applicant that they have met all the conditions

required as they have moved to court without undue delay, they have deposited the decretal sum in court and will be easily accessed by the successful party, they have genuine complaints to take up on appeal as shown by their grounds of appeal whose merits cannot be gone into at this stage of the proceedings as this deal with the argueability of the appeal whose merits will be gone into on appeal. Further that since the opposite party was informed that they were proceeding with the appeal they should not be penalized in paying the Auctioneers charges. They are here in good faith and the Respondent should pay costs of the application. They are opposed to the Respondent being allowed to proceed with execution as this will lead to substantial loss as the Respondents ability to refund the same has not been demonstrated in view of the fact that they are attacking the entire evidence forming the basis of the judgment in favour of the Respondent.

In response counsel for the Respondent relying on the grounds in the replying affidavit urged the court not to grant stay because:-

- (i) No demonstration has been made that Respondent will not be in a position to refund the decretal sum should the appeal succeed.
- (ii) They were entitled to execute as there were no orders for stay barring them from doing so and so they cannot agree to be penalized to pay the Auctioneers charges.
- (iii) The applicant should also be called upon to provide security for costs.

On the Courts assessment of the facts herein this court agrees with the submission of both sides that the ingredients for granting stay have to be satisfied.

- (1) Presentation of the application without undue delay.
- (2) Establishment that substantial loss will be suffered by the applicant.
- (3) There is an arguable appeal with a likelihood of success which will be rendered nugatory should the appeal succeed.
- (4) Provision for security for costs has been made.

This court has applied these principles to the facts herein and makes the following findings.

- (1) As regards undue delay it is gathered from the memorandum of appeal and application that judgment was delivered by the lower court on 5.3.2007. The appeal was filed on 3.4.2007 and the application subject of this ruling on 24.4.2007. This sequence of events satisfies the criteria that the applicant moved to Court without undue delay.
- (2) As for the requirement for the willingness to meet the resultant decree, this has also been met by the depositing of the decretal amount in court.
- (3) As for the demonstration of substantial loss if the decretal amount is paid over to the Respondent, this has not been done as no facts have been placed before this court to show that the Respondent cannot refund the same. As submitted by the Respondents Counsel there should be tangible evidence and not statements from the bar. No tangible evidence has been displayed. However, that notwithstanding the court should not lose sight of the Respondents responsibility to demonstrate his/her ability to refund the same should the appeal succeed. The duty therefore falls on both for one to assert and the other to oust. Neither side has fulfilled its side of the bargain as regards substantial loss. That notwithstanding the court seized of the matter is not precluded from opting for the need to preserve the amount in some neutral position so that it is easily accessed by the successful party as opposed to making parties engage in further litigation processes either in the same proceedings or other subsequent proceedings to enable the successful party recover the money paid over. The neutral party is usually the court. Such neutral party has already been recruited into the proceedings as the decretal amount has already been deposited in

court. The deposit was in pursuance of a court order, which court order was made after the court perusing the documentation on record. In this courts view, that court was satisfied that this was the most appropriate thing to do in the circumstances of this case. This court sees no need to overturn that order. It is a better option in the circumstances of this case.

(4) As for the Auctioneers charges, the respondent can only be penalized if they moved to execute in the wake of a stay order. It is submitted by them that as at the time they moved there was no stay order. They had a judgment in their favour which they were entitled to execute and so they cannot be penalized for taking a procedural step they are entitled to take to realize the fruits of their judgment. If any thing it is the appellants/applicant who is to be penalized for standing in their path of execution by wanting to be heard on the appeal before execution process can be concluded. This waiting is in their favour and so they are the ones to meet those costs.

(5) As for security for costs, this can be ordered to be deposited where need arises especially where recovery might be a problem. Herein the applicant has already demonstrated ability to pay by depositing the decretal sum in court and so there is no need for them to demonstrate that the ability to pay costs by being required to deposit an amount as security for costs – More so when there is an impending order to pay Auctioneers charges. Such an additional requirement to deposit security for costs would be too punitive.

In the final result this court is inclined to grant stay pending appeal on the following conditions.

- (1) The deposit of the decretal sum into court made on 24.4.2007 to remain so deposited until the appeal is heard and finalized or until further orders of the court.
- (2) The applicant/appellant to pay the Auctioneers charges to be agreed, assessed or taxed by the Deputy Registrar of this Court.
- (3) The Respondent to have costs of this application. The said costs to be agreed, assessed or taxed by the Deputy Registrar of this court.
- (4) The applicant to move with speed to process the appeal for hearing and disposal.
- (5) There will be liberty to apply to either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY 2007.

R. NAMBUYE

JUDGE