



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPLICATION NO. 1 OF 2014

REBECCA KAVETE WANYONYI.....APPLICANT

VERSUS

KENNETH KIMANZI.....RESPONDENT

RULING

The applicant brought an application dated 31st March 2014 and filed on the same date seeking stay of execution pending hearing and determination of the appeal. The application is inelegantly drafted but this court, in the spirit of Article 159 (1) (d) of the Constitution 2010, will not place undue regard to procedural technicalities.

Briefly, the applicant states that if stay of execution is not granted, her appeal will be rendered nugatory; that she will suffer irreparable loss and that her intended appeal has high chances of success.

At the hearing of this application, Mr. Mbaluka for the Respondent sought time to file a replying affidavit for reasons that when he was served with the hearing notice, the application had not been served on him. I have perused the court records. Indeed I did not see any evidence of service of this application. The affidavit of service dated 12th May 2014 and filed on 9th June 2014 refers to a hearing notice dated 10th April 2014. A reading of a copy of that notice shows that it refers to hearing of the suit and does not include copies of application.

Since the applicant opposed the application for adjournment and told the court that she is not available to attend court on the proposed date for hearing of the application, Mr. Mbaluka opted to submit on points of law only. The court allowed this.

The application was opposed. Mr. Mbaluka submitted that the application is incompetent, bad in law and an abuse of this court's process; that the applicant has not satisfied the conditions laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules for granting stay; that she has not shown that she will suffer irreparable loss if stay is not granted; that the claim is for Kshs 164,647 and that it has not been shown that if she succeeds in the appeal this money cannot be repaid to her.

Secondly, the applicant has not deposited any security for due performance of the decree to show that she is making this application in good faith.

Thirdly, the application was not made immediately; that the applicant did not seek stay of execution in the lower court and that she made the application nine months after the decree was issued. It was submitted that there was inordinate delay.

In response the applicant submitted that the delay in filing stay was caused by delay in procuring proceedings from the lower court.

I have considered the application. It is true that the judgement of the lower court was delivered on 5th June 2013. This application has been filed in on 31st March 2014 almost nine months after judgement and decree. The reason for delay in filing the application is given as due to the delay in receiving proceedings from the lower court. It is claimed by the Respondent that the applicant did not seek to stay execution in the lower court. The applicant did not respond to this claim.

The law is clear in regard to applications seeking stay of execution. The applicant must satisfy the court that:

- i. Substantial loss may result to the applicant unless the order is made.
- ii. The application has been made without unreasonable delay.
- iii. The applicant has provided security for due performance of the decree.

The claim is for Kshs 164,647. The applicant has not shown that if she were to be successful in her appeal, the Respondent is not able to pay this amount to her. Secondly, the application was filed in March 2014 when judgement was delivered on 5th June 2013. The applicant claims that the proceedings were delayed before she procured them. I have noted that other than a receipt dated 14th June 2013 purportedly for proceedings, there is no other evidence as to when she received those proceedings. She did not attach any letter showing her request for the proceedings and there is no stamp on the proceedings and judgement to show the date she received them other than the date the judgement was delivered.

Finally, the applicant has not deposited security for due performance.

After my careful consideration of this application, it is my view that the applicant has failed to satisfy this court that the requirements for granting stay of execution pending appeal have been met. For this reason, I hereby find that the application for stay of execution lacks merit and the same is dismissed. Each party will pay its own costs. It is so ordered.

Dated, signed and delivered this 16th June 2014.

S.N.MUTUKU

JUDGE