



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**MISC CIVIL APPEAL NO E108 OF 2021**

**BENSON MWANGI KILONZO.....1<sup>st</sup> APPELLANT**

**JOSEPH ANUNDA.....2<sup>nd</sup> APPELLANT**

**-VERSUS-**

**EWV (Minor suing through his father and next friend BS).....RESPONDENT**

**RULING**

1. By a Motion dated 9<sup>th</sup> July, 2021, the Applicant herein seeks an order for stay of execution of the Judgement/Decree in Kangundo CMCC No. 90 of 2020 pending the hearing and determination of this appeal. They also seek that the costs of the application abide the appeal.
2. The application was supported by an affidavit sworn by **Kevin Ngure**, the Deputy Claims Manager at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KCH 910L at whose instance the above cited suit was defended. According to the deponent, he swore the supporting affidavit by virtue of their rights of subrogation under the relevant policy of insurance and the common law rights to defend, settle and prosecute any claims in the insured's name.
3. According to the applicant, judgement was delivered in the said case on 15<sup>th</sup> June, 2020 in the sum of Kshs 202,100/- against the Applicant in which the Applicant was held 100% liable plus costs and interests.
4. According to the deponent, aggrieved by the said decision, they instructed their advocates on record to appeal against the said judgement.
5. In the Applicant's view, the intended appeal is merited, arguable and raises pertinent points of law thus has overwhelming chances of success.
6. It was further deposed that the applicants are apprehensive that if paid over to the Respondents, the appeal if successful would not be recovered since the Respondent has not furnished the court with evidence of her financial standing.
7. The applicants undertook to furnish reasonable security by way of a Bank Guarantee.
8. In the submissions filed on behalf of the Applicant, it was contended that the right of appeal is a constitutional right which is the cornerstone of the rule of law and that to deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.
9. According to the applicant, the Memorandum of Appeal filed on 19<sup>th</sup> August, 2021 sets out precisely the grounds upon which the Appellants intends to appeal the decision of the lower court. The Appellants are appealing mainly on quantum as an excessive award was made by the lower court which is not proportionate to the injuries suffered and the evidence that was tabled before court which injuries ought to have attracted a lower award based on the similar recent decided cases. It was therefore submitted that the Memorandum of Appeal herein is arguable and raises serious points of law and fact that warrant the Court's intervention on appeal.
10. According to the applicant, in applications for stay pending Appeal, in the subordinate courts it is not a requirement to show that the Appeal has high chances of success and that the Applicant only needs to show he has an arguable appeal. This submission was based on the decision of the Court of Appeal in **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR**. On that basis it was

submitted that the Applicants Appeal herein is merited and is based on very strong grounds with high chances of success and it is therefore paramount and important that the Appellants are given an opportunity to ventilate their Appeal on merits.

11. It was further submitted that from the supporting affidavit, it has been demonstrated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants/Appellants Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing. The Respondent, it was noted, in his Replying Affidavit, did not dispute this and/or show that she had means of paying the decretal amount in the event judgment was delivered in favour of the Applicant. However, it is only the Respondent who can specifically show that she has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds and reliance was placed on **Edward Kamau & Anor vs. Hannah Mukui Gichuki & Anor (2015) eKLR**.

12. Based on the said decision, it was contended that in the absence of an Affidavit of means the Respondent's financial status is still unknown and has not been proven. There is therefore likelihood that the Respondent has no means to refund the decretal amount. Since there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, pursuant to Section 112 of the **Evidence Act**, the evidentiary burden is shifted to the Respondent to show that she has financial resources to satisfy the decretal amount. Since the Respondent has chosen not to show that she has financial resources to pay the decretal amount in the event the Appeal already filed succeeds, the court was urged to allow the Application for stay of execution.

13. According to the applicant, application has been filed so quickly under vacation rules after the delivery of the judgement. It is noted that the appeal was filed on 19<sup>th</sup> of August, 2021 soon after the delivery of judgement thus signalling the Applicant's interest in pursuing the appeal. It is only after the Respondent's counsel wrote to the Applicant's counsel about the intention to execute that the Applicant found it necessary to file the instant application. There is thus no inordinate delay on the part of the Applicant.

14. As regards security, it was submitted that the Appellants are ready and willing to provide security in the form of a bank Guarantee pending the hearing and determination of the appeal. In this respect, the applicant cited **Selestica Limited vs. Global Rock Development [2015] eKLR** and submitted that the Applicants having satisfied all the conditions set out in Order 42 Rule 6, they should be granted an order of stay of execution pending hearing and determination of the Appeal.

15. In response to the Application, a replying affidavit was sworn by **Sethna Isabwa Atonga** the Respondent's advocate in which it was deposed that no judgement was ever rendered by Hon. Orimba (SPM) in this matter and that the Applicants' Advocates do not even know which Court rendered Judgement and whose orders they are seeking to stay. According to the deponent, the Application is frivolous, vexatious and an abuse of the Court process since it is brought in bad faith since the 45 days Lower Court stay orders issued by Hon. M. Opanga (SRM) on 15/6/2021 were still in force when this Application was made.

16. It was therefore deposed that the Applicant is forum shopping and abusing the Court process and already has stay orders in Kangundo SPMCC No.90 of 2020. Further, the Application is an afterthought and a ploy meant to buy time, delay, deny and frustrate the Respondent from enjoying fruits of judgement. It was disclosed that on 15<sup>th</sup> June, 2021 Hon. Opanga delivered Judgment and granted the Applicants 45 days stay which the Respondent did not oppose but several Correspondence to have the Applicants settle the decretal amount have been futile.

17. The Respondent contended that she was not aware of any Appeal filed with this Court within the 30 days stipulated by the law. It was the Respondent's case that the Applicants should deposit half of the decretal amount (Kshs. 399, 217.50) with the Respondents' Advocates and the other half with the Court. It was the Respondent's case that should the Application be allowed as brought, the Respondent will be gravely prejudiced since he will be denied the legitimate expectation and right to enjoy fruits of Judgement. To the Respondent, the decretal amount is very reasonable and the intended appeal if any has zero chances of success.

18. According to the Respondent, the Applicants' have not demonstrated what loss and how they will suffer substantial loss and that the Application is unnecessary and filed purely to delay and frustrate execution yet justice delayed is justice denied. It is meant to thwart the Respondent's legitimate expectation and is a waste of precious judicial time meant to frustrate a litigant who should not be kept away from enjoying the fruits of his Judgement.

19. However, should the Court be inclined to grant the Appellant's Application, it was urged to order the Appellant/Applicant to deposit half of the decretal amount of Kshs. 798, 434.95 being Kshs. 399, 217.50 with the Respondent's Advocates and the other half of the decretal amount in Court.

20. It was submitted on behalf of the Respondent that the conventional provision for stay pending Appeal is Order 42 rule 6 which presumes that an Appeal has been lodged but the Respondent is not aware whether the Applicants' have filed any substantive Appeal before the High Court and cannot seek stay orders in a vacuum as they are trying to. It was reiterated that the Applicants are still enjoying lower Court Orders hence the Court was urged to dismiss the application with costs to the Respondent.

21. According to the Respondent, the Applicants have not met the conditions for grant of stay pending appeal under Order 42 rule 6(2) of the **Civil Procedure Rules, 2010**. It was submitted that the Applicants had not demonstrated how they would suffer substantial loss and that the Application was brought more than 1 month after judgment hence the Application and the intended Appeal were an afterthought and no reason was advanced for this delay or a sufficient/reasonable explanation given.

22. The Applicants, it was submitted, have offered a general bank guarantee nothing specific nothing concrete which is not enough. The Respondent reiterated that should the Court be inclined to give them the Orders sought it should do so on condition that they release half of the decretal amount to the Respondent and the other half be deposited in Court. We believe this would be fair to both parties. They should also be ordered to file and serve the Record of Appeal within 30 days from the date of the Court's Ruling on this Application failure which the stay orders should lapse automatically.

23. The Respondent relied on the case of **Henry Sakwa Maloba vs Boniface Papando Tsubuko**[2020]eKLR where the Court held that if any of the above grounds is not fulfilled then the Application for stay fails as it should in this case. In this case, it was submitted that the Applicants merely stated they will suffer loss but have not demonstrated how and in what manner they would suffer loss if their Application is declined and the court was urged to dismiss the Applicants' Notice of Motion Application dated 9<sup>th</sup> July, 2021 with costs to the Plaintiff/Respondent.

24. However, should the Court be inclined to grant the Application for Stay pending Appeal, the Court urged that the Appellant should be made to release half of the decretal amount within 21 days to the Respondent and the other half be deposited in Court.

### **Determination**

25. I have considered the application, the supporting affidavit and the grounds of opposition to the application and the submissions filed.

26. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules** provides as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”***

27. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

28. In my view even if it were shown that the respondent is a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

29. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

***“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”***

30. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999**.

31. I therefore agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

***“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”***

32. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay

would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

33. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is Kshs 600,000.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers. The Applicant seems to be of the view that in such application, once they make bare allegations that the Respondent's means are unknown the burden shifts to the Respondent to disclose her means. While that may apply to situations where the award is *prima facie* large, in cases such as this one where the amount awarded is not that large, such a bare averment will not do. The Respondent being the successful party is in the driving seat and therefore to remove her from the seat, satisfactory basis must be laid by the Applicant.

34. In this case however, the decree holder is the father of the minor decree holder. The said father has not sworn any affidavit to controvert the allegations made by the applicants. While the applicants have not fulfilled all the conditions for grant of the stay, this Court cannot lose sight of the fact that should the appeal succeed and by then the decretal sum having been paid out, it may not be easy to recover the same from the minor. I have however perused the intended grounds of appeal and it would seem that the applicants are aggrieved by quantum of damages as opposed to the liability.

35. In the premises, there will be a stay of execution pending the said appeal on condition that the Applicants remit to the Respondents half of the decretal sum and issues a bank guarantee from a reputable bank to secure the balance of the decretal sum during the period of the appeal within 30 days from the date hereof and in default the application for stay shall stand dismissed.

36. The costs of this application are awarded to the Respondent in any event.

37. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF FEBRUARY, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Gathenya for Mr Ouko for the Applicant**

**Mr Atonga for the Respondent**

**CA Susan**