



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL CASE NO. E005 OF 2022

BETWEEN

REUBEN MUTWIRI MUTURA.....APPELLANT/APPLICANT

AND

SILAS MUTWIRI.....RESPONDENT

RULING

Background

1. On 16th December, 2021, the court in **MAUA CMCC 28 OF 2020** entered judgment in favour of the Respondent as against the Appellant/Applicant for Kshs. 1,110,500/-.

2. By a notice of motion dated 02nd February, 2022, Appellant/Applicant seeks orders for:

1. Stay of execution of judgment in MAUA CMCC 28 OF 2020 pending the hearing and determination of the appeal

2. Costs be provided for

3. The notice of motion is premised on grounds among others that the Appellant/Applicant is aggrieved by the judgment of the trial court and that the appeal has high chances of success.

4. The application is also supported by an affidavit sworn by the Applicant in which he reiterates the grounds on the face of the application. Additionally, he avers that his insurer Direct Line is willing to furnish a bank guarantee from BTB Bank as security for the judgment sum.

5. Respondent opposed the application by way of an affidavit sworn on 14th February, 2022 and prays that 90% of the judgment sum be released to him.

Analysis and Determination

6. I have considered the application in light of affidavit on record the issue for determination is whether there ought to be Stay of execution of judgment in **MAUA PMCC 12 OF 2021** pending the hearing and determination of the appeal

7. Concerning stay of execution, Order 42 (6) of the Civil Procedure Rules provides:

(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

b. That the application has been made without unreasonable delay; and

c. 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.

8. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. Similarly, in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“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 suits.”

10. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11. The Respondent was awarded general damages in the sum of Kshs. 1,110,500/. Whereas this is a money decree, there is no evidence that the Respondent is in a position to refund the decretal sum in the event that the appeal succeeds and that is adequate evidence that Appellant is likely to suffer substantial loss if an order for part payment is made in favour of the Respondent.

12. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellants have offered to furnish a bank guarantee for due performance of the decree herein pending the hearing and determination of the appeal.

13. Whereas it is not my duty at this stage to determine if the Applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellants an opportunity to prosecute their appeal.

14. In the end, dated 02nd February, 2022 is allowed in the following terms:

1. There shall be a Stay of execution of judgment in MAUA CMCC 28 OF 2020 pending the hearing and determination of the intended appeal on condition that the Appellant/Applicant shall furnish a bank guarantee from DTB Bank as security for the decretal sum within 30 days of today’s date

2. The Appellant/Applicant is directed to file and serve the record of Appeal not later than 30 days’ from today’s date

3. Mention on 06th April, 2022 to confirm compliance with orders 1 and 2 above

4. Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 24TH DAY OF FEBRUARY, 2022

T.W. CHERERE

JUDGE

Appearances

Court - Morris Kinoti

For Appellants/Applicants – Ms. Laboso for Kimondo Gachoka & Co Advocates

For Respondent - Ms. Kirimi for Ngunjiri Michael & Co Advocates