



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E481 OF 2021

BERNARD ONTITA ZEBEDEO.....APPELLANT/APPLICANT

VERSUS

JULIUS NYAMWEGA ONTERE.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 2nd December 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the judgment delivered on 7th July, 2021 pending the hearing and determination of the appellant's Appeal.
2. The respondent opposed the Motion by filing the replying affidavit he swore on 27th January 2022.
3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. A brief background of the matter as seen in the record is that the respondent instituted a suit before the Chief Magistrate's Court against the applicant vide the plaint dated 14th February 2020 and sought for general damages and special damages of Kshs.8,580/= together with costs arising from road accident along Jogoo Road.
6. Upon hearing the parties, the court vide the judgment delivered on 7th July 2021 awarded the respondent an aggregate sum of Kshs.808,580/= as damages plus costs of the suit and interest at court rates. Being aggrieved by the aforementioned decision, the applicant appealed to this court against the lower court's judgment.
7. In his affidavit filed in support of the motion dated 9/12/2021, Mr. Bernard Ontita Ontere, stated that he filed an application dated 13th March, 2021 before the trial court seeking execution of the judgment and urged the court to direct security of the decretal sum in form of bank guarantee from a reputable bank rather than cash as the Applicant has appealed on both liability and quantum.
8. He further stated that the trial court allowed the application dated 3/8/2021 upon stringent conditions being that the Applicant pays half the decretal sum to the advocate and the other half be deposited in a joint interest earning account within 21 days otherwise the execution to proceed.
9. The applicant's states that efforts have been made to obtain a copy of the Order from the ruling which have turned out to be unsuccessful as the learned Magistrate delivered it in Mombasa and the file has not been returned to the Nairobi registry.
10. He avers that the stringent conditions on the security to be provided has the effect of frustrating, preventing and/or denying the Applicant a chance to comply with the terms for grant the order of stay thus exposing them to imminent execution proceedings despite the pending appeal.
11. The Applicant contends that in the interest of justice to allow status quo to be maintained by holding off execution process on terms/conditions that do not make it impossible for the Applicant to comply with them pending the hearing and determination of the Appeal.
12. In response, Mr. Julius Nyamwega Ontere stated that the Applicant's application is a constructed mode of delaying and denying him from enjoying his fruits of his judgment and that the Applicant has not demonstrated the loss they can or likely to suffer should he be paid the decretal sum.

13. The Respondent avers that since Applicant is not ready to abide with the trial court condition given to allow stay of execution then they should be ordered to pay the Respondent two thirds of the decretal sum and deposit the a third to a fixed deposit joint account of both advocates failure to which execution to proceed.

14. I have considered the grounds stated on the face of the Application plus the facts depend in rival affidavits.

15. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—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 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.

16. On the issue of substantial loss, which is the cornerstone in an application for stay. The Respondent had stated the Applicant should be made to pay them two thirds of the decretal sum and deposit a third in a joint interest account failure to which execution to proceed yet the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed.

17. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgment and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

18. The applicant had indicated that the stringent conditions that were given by the trial court were that he had to pay half the decretal sum to the Plaintiff’s advocate and the other half to deposited in joint interest earning account which the Applicant felt he could not be able to do so.

19. The Applicant has indicated that in the interest of justice that the court should allow the status quo be maintained by holding off execution on terms that do not make it impossible for the Applicant to comply. The applicants had sought for an order to the effect that they be allowed to provide a bank guarantee from reputable bank as security for the decretal sum pending the hearing and determination of the Appeal.

20. In *Harit Sheth Advocate -vs- Shamas Charania – Civil Appeal No. 68 of 2008*, this Court held:-

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

21. A perusal of the memorandum of appeal shows that the Applicant is appealing against the decision on liability and quantum. The Respondent’s proposal that he gets two thirds of the decretal amount is not acceptable because there is no guarantee that the respondent is in a position to refund should the appeal turn out to be successful.

22. In the end the motion dated 2nd December 2021 is found to be meritorious. It is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.

23. Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent