



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E609 OF 2021

SADAM JAMAL OMAR.....APPLICANT

-VERSUS-

DAVID MWENDWA MATHENDU.....RESPONDENT

RULING

- 1) Sadam Jamal Omar, the applicant herein, took out the motion dated 24th September 2021 in which he sought for an order for stay of execution of judgment/decreed delivered by the Chief Magistrate's Court on 20th August 2021 pending appeal.
- 2) The applicant filed an affidavit he swore in support of the motion. When served David Mwendwa Mathendu, the respondent herein, filed a replying affidavit he swore to oppose the application.
- 3) Learned counsels appearing in this matter made oral submissions when the motion came up for interpartes hearing.
- 4) I have considered the grounds stated on the face of the motion dated 20th August 2021 plus the facts deponed in the rival affidavits. I have also taken into account the rival oral submissions. The principles to be considered in determining an application for stay are well stated under Order 42 rule 6 of the Civil Procedure Rules.
- 5) The first principle is that the application for stay must be filed without unreasonable delay. The record shows that the trial court delivered its decision on 20th August 2021 and the instant application was filed on 24th September 2021. I am satisfied the same was timeously filed.
- 6) The second principle is that an applicant must show the substantial loss he would suffer if the order for stay of execution is denied. It is the submission of the applicant that unless the order for stay is granted the respondent would execute thus rendering the appeal obtuse hence making him suffer substantial loss.
- 7) Miss Wambua, learned advocate for the applicant stated that the respondent is not in a financial position to make a refund of the decretal amount if the appeal turns successful.
- 8) The respondent opposed the application stating that the applicant has not shown the substantial loss he would suffer if the order for stay is not granted. The respondent further argued that if this court is inclined to grant the order for stay then the applicant should be ordered to pay the respondent a sum of ksh.600,000 an amount the applicant had stated he was ready to pay to settle the claim and then deposit the balance in an interest earning account in the joint names of the advocates.
- 9) The respondent did not state whether he was in a financial position to make a refund if the appeal succeeds. I am convinced that the applicant has clearly shown that he would suffer substantial loss if the order for stay is denied, in that the respondent may not be in a position to refund the decretal sum if paid.
- 10) The third and final principle is that security for the due performance of the decree should be provided. I have already taken into account the proposals made by the respondent. The applicant has offered to provide a bank guarantee for the entire decretal sum. I think a bank guarantee from a reputable bank is sufficient and reasonable.
- 11) In the end, I find the motion dated 24.9.2021 to be meritorious hence it is allowed. Consequently, an order for stay of execution of the decree pending appeal is granted on condition that the applicant provides a bank guarantee for the sum of ksh.1,203,550 within 45 days from the date hereof. In default the order for stay shall automatically lapse and the respondent may have the liberty to execute the decree. 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.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent