



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E002 OF 2022

NICHOLAS STEPHEN OKAKA.....1ST APPELLANT/APPLICANT

CHARITY NJOKI MUIGAI.....2ND APPELLANT/APPLICANT

VERSUS

AGGREY ODHIAMBO ODUNDO.....RESPONDENT

RULING ON STAY OF EXECUTION PENDING APPEAL

1. This ruling determines the applicants' Notice of Motion dated 2.2.2022 and filed on the 4.2.2022 brought under the provisions of Sections 1A and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act as well as Articles 50 & 169 of the Constitution.

2. The applicants seek the following orders:

a) *Spent*

b) *Spent*

c) *That this Honourable Court be pleased to order for stay of execution of the judgement and/or decree made on 17th September 2021 where the honourable court held the appellant 100% liable for Kshs. 500,000 as General damages, special damages of Kshs. 3,050 together with costs and interest, pending the hearing and determination of this appeal Siaya High Court Civil Appeal No. 2 of 2022.*

d) *That costs of this application be provided for.*

3. The application is supported by the affidavit of one Joan Turgutt advocate for the appellant /applicant.

4. The applicants' case is that they are aggrieved by the decision of the Court in ***Bondo PMCC No. 46 of 2020 Aggrey Odhiambo Odundo v Nicholas Stephen Okaka & Another*** delivered on the 21.2.2022 and have since lodged an appeal challenging the judgment and decree.

5. They further aver that the judgement subject matter therein being substantial, should the execution proceed, they stand to suffer irreparable loss and prejudice and further that the ability of the respondent to refund the decretal amount is unknown. It is their case that their appeal raises triable issues with high chances of success and that failure to stay the execution proceedings therein, the appeal stands to be rendered nugatory.

6. The applicants aver that they are ready and willing to provide a bank guarantee from Family Bank as security for stay of execution pending the determination of the appeal.

7. Opposing the application for stay pending appeal, the respondent through his advocate Denis Odera Okeyo, and vide a replying affidavit dated 11.2.2022 and filed on the 14.2.2022 contends that the applicant filed an application dated 30.9.2021 in which they sought to set aside the trial court judgement delivered on the 17.9.2021 but the said application was dismissed vide the trial court's judgement of 21.2.2022.

8. It is the respondent's case that under Order 12 Rule 7 there is no automatic appeal against judgement entered under Order 12 as the order provides for recourse by way of setting aside or varying the disputed order prior to appeal and as such the applicants' appeal is incompetent.

9. The respondent avers that the instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.

10. The parties agreed to canvass the application by way of written submissions and while the applicants filed their submissions, the respondent indicated that he would rely on his replying affidavit as well as the cases of **Peterson Munjau Mbae v Antonisio Njue Njeru (2021) eKLR** & that of **Kitui Maziko Rai & Another v NAS (Suing thro' father and nest friend AS) (2020) eKLR**.

11. In their written submissions, the applicants aver that they will suffer substantial loss if they pay the judgement sum as the injuries suffered by the respondent were never confirmed and further that the respondent's means of income are unknown and presumably insufficient as they were not attested to during the trial at the subordinate court and as such, it cannot be guaranteed that the respondent will be in a position to refund the judgement sum of Kshs. 503,050 plus costs and interests.

12. It is further submitted by the applicants that the respondent has not filed any affidavit of means to confirm his financial means or status thus there is a risk of failure to compensate the applicants should the appeal succeed. Reliance was placed on the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Bishar & Another [2018] eKLR** where the court also considered the respondent's ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the respondent on record on the means.

13. It was further submitted that should execution of the judgement/decreed of 28.10.2021 proceed, the applicants' appeal will be rendered nugatory and expose the applicants to irreparable loss and damage, as the respondent being a man of straw would be incapable of effecting a refund thereof. Further, it is submitted that it is in the interest of justice that the orders sought are granted and that failure will amount to denying the applicants the opportunity to exhaust its legal remedies.

14. It was submitted that there is no inordinate delay by the appellant in bringing the instant appeal as it was filed vide a memorandum of appeal on the 27.1.2022 whereas the ruling being appealed was passed on the 21.1.2022.

15. On security for costs it is submitted that the same is complied with as is demonstrated by the bank guarantee provided and annexed to the applicants' supporting affidavit. It is submitted that a bank guarantee is an acceptable way of furnishing security as was held in the case of **Justin Mutinga David v China Road & Bridge Corporation (K) Limited [2019] eKLR**.

16. The applicants' counsel further submitted that the merits of the appeal are not a factor to consider when determining an application for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. In addition, it was submitted that this appeal is highly arguable and thus meritorious with a very good chance of succeeding.

17. The authorities cited by the respondent in support of his opposition and the replying affidavit both address setting aside of orders of the trial court that have failed, seeking to compel the plaintiff to proceed for a second medical examination and the subsequent implications.

Determination

18. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients.

19. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.

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

“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.

21. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions.

22. Section 1A(2) of the **Civil Procedure Act** provides that ***“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”*** while under section 1B some of the aims of the said objectives are; ***“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”***

23. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) 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) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See **Antoine Ndiaye v African Virtual University [2015] eKLR**.

24. As to what substantial loss is, it was observed in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

25. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 503,050 as well as costs and interest if stay of execution is not granted. They further aver that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.

26. On his part, the respondent has not addressed the issue of stay of execution but instead delved into the merits of the appeal. This is evident from a scrutiny of the authorities relied on by the respondent which as earlier stated address setting aside of orders of a trial court.

27. The court, in **RWW v EKW [2019] eKLR**, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

28. In this case, the Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicants’ counsel that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.

29. I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 21.1.2022 and the Memorandum of Appeal filed six days later on the 27.2.2022.

30. As to security of costs, the appellants have made provision for a Bank Guarantee meaning, they are able and willing to comply with that condition on security for the due performance of the decree appealed from. However, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

31. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

32. Accordingly, I hereby allow the applicant/appellants’ application dated 2/2/2022 and grant stay of execution of decree made in **Bondo PM CC No. 46 of 2020 Aggrey Odhiambo Odundo vs Nicholas Stephen Okaka and Charity Njoki Muigai** on the following conditions:

- a) The applicants/ appellants shall deposit the entire decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 21 days of this ruling;
- b) The appellant to file and serve a record of appeal within thirty (30) days of this ruling;
- c) Costs shall be in the cause;
- d) The appeal shall be mentioned on 4th May 2022 for directions on the mode of disposal of the appeal.

33. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF MARCH, 2022

R.E. ABURILI

JUDGE