



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. E081 OF 2021

JAPHETH AKOTH OYACH.....1ST APPELLANT/APPLICANT

ANTHONY MURIKI MUGAMBI.....2ND APPELLANT/APPLICANT

-VERSUS-

FRANCIS OMOLLO OTIENO.....RESPONDENT

RULING

The application for consideration is the one dated 21/10/2021 filed on 25/10/2021 by the applicants. The applicants seek a stay of execution of the judgement and decree of the Principal Magistrate's Court at Rongo vide Rongo PMCC No. E006 of 2020 dated and delivered on 16/9/2021.

The grounds upon which the application is premised are found in the body of application and the supporting affidavit of **Japheth Akoth Oyach**, the 1st applicant. The 1st applicant deponed that he is aggrieved by the decision of the trial court has and filed the instant appeal; that the 30 days stay issued by the trial court lapsed and he is apprehensive that the respondent will commence execution proceedings; that the respondent is not in gainful employment and will not be able to refund the applicant the decretal sum if the appeal succeeds, hence he shall suffer substantial loss; that he is ready and willing to abide by any condition(s) that this court may deem fit to decree in the circumstances.

The application was opposed. The respondent Francis Omollo Otieno filed a replying affidavit sworn and dated erroneously on 4/11/2018. The respondent deponed that he had been advised by his advocates on record that the applicants are using the application as a delaying tactic to deny him the fruits of his judgement; that although the applicants have a right of appeal, it should not override his right to enjoy the fruits of a just judgement; that he sustained serious injuries which rendered him to be 25% incapacitated and now he has turned into a beggar; that since he has children who are still in school, the court should order half of the decretal sum amounting to Kshs. 1,013,420/= be paid to him while the other half is deposited in a joint interest earning account pending the hearing and determination of this appeal.

The application was canvassed by way of written submissions. Both parties complied I have considered the application, affidavits and submissions.

The application is one of stay pending appeal. **Order 42 Rule (6) (1) and (2)** makes provision for stay pending appeal as follows:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 ultimate be binding on him has been given by the applicant.”

The four (4) salient ingredients that the applicant should establish for an order of stay of execution to issue are: -

- a. He shall suffer substantial loss if stay is not granted;
- b. That the application has been filed without unreasonable delay;
- c. The applicant is willing to furnish security for the due performance of the decree;
- d. The applicant has an arguable appeal.

On the issue of substantial loss, it is the applicant's submission that the respondent cannot repay back the money as he has not demonstrated in his affidavit that he is a man of means. In the case of **Silverstein v Chesoni (2002) 1 KLR 867** cited in **Superior Homes (Kenya) Limited vs Musango Kithome (2018) eKLR** the Court of Appeal held as follows:-

"...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"

The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In **Superior (Homes) Kenya Limited vs Musango Kithome (supra)**, the court held:-

"...The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. 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."

A similar finding was made in **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua (2001) eKLR** as follows:-

"...Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient."

From the above cited decisions, the evidential burden of proving one's means lies on the Respondent.

The appeal challenges the decretal amount and special damages awarded to the Respondent. The respondent deponed that since the accident, he has not been in gainful employment and he is relying on the damages awarded to him to enable him to fend for himself and his family and the court should consider releasing half of the decretal amount to him. Annexed to his affidavit are the admission letters, result slips of his children together with a money lending agreement between the respondent and Rapogi Women Group.

In as much as this court sympathises with the respondent's situation, it is impossible to release as much as half of the decretal sum, which is in dispute. From the above admission it is my view that the Respondent is not in a position to refund the decretal amount if the appeal succeeds and the applicant shall suffer substantial loss and the appeal will be rendered nugatory.

However, this court has a duty to try and balance the rights of the parties. The applicant should not be put in a position to suffer substantial loss while at the same time, the respondent should not be kept away from enjoying the fruits of his judgement. In **M/s Port Reitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** the court observed that the power to grant an application for stay of execution pending appeal is discretionary in that the court when granting a stay needs to balance the interests of the appellant with those of the respondent.

In balancing the interests of both parties, and because liability is not disputed, I am inclined to order a release of the sum of **Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000/=)** to the respondent pending the outcome of the appeal. The applicants have already deposited a sum of Kshs. 500,000/=with the court.

On whether there was unreasonable delay in bringing this application, **Section 79G of the Civil Procedure Act** provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on 16/9/2021, and the instant appeal was filed on 22/9/2021. The complete record of appeal was filed in court on 2/12/2021. I therefore find that there was no delay.

On security for the due performance of the decree, the applicant averred that he is willing to abide by the court's orders in regard to security for due performance of the decree. On 25/10/2021, this court directed that the applicant deposits Kshs. 500,000/= as a condition for stay. The applicant submitted that the same has already been complied with and the respondent has not disputed the same. I find that the applicant has fulfilled this condition and provided security for the due performance of the decree.

Whether the applicant has an arguable appeal: the applicant disagrees with the trial court's finding that the respondent suffered the said injuries as there was sufficient proof; that the award in damages was excessive and the award in special damages was not proved. These

are arguable issues. I find that the applicant has satisfied all the ingredients necessary for the grant of an order of stay.

In the end, I make the following orders: -

- a. There be a stay of execution of the decree/judgement delivered on 16/9/2021 in PMCC No. E006 of 2020 Francis Omollo Otieno vs Japheth Akoth Oyach & Another pending the hearing and determination of the appeal.**
- b. The sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) deposited in court be released to the respondent within 21 days of this ruling. The same will act as security.**
- c. The appeal be canvassed by way of written submissions.**
- d. The applicant to file and serve his submissions within 14 days from the date of this ruling.**
- e. The respondent to file and serve his submissions within 14 days from the date of service.**
- f. The applicant is at liberty to file a response (if any) within 7 days from the date of service.**
- g. Costs of this application do abide the outcome of the appeal.**
- h. Matter to be mentioned on 21 / 6/ 2022 to confirm compliance and to take a judgement date.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 28TH DAY OF APRIL, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant

Mr. Odero holding brief Mr. Momwacha for the Respondent

Nyauke Court Assistant